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The History of Article 21.21 and Deceptive Trade Practices Act

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THE INSURANCE LAW SECTION OF THE STATE BAR OF TEXAS

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On the Cover:
The soaring atrium of the Johnson County courthouse is lit by an elaborate art-glass skylight six floors above the sub-basement level. When Dallas architects Lang & Witchell designed the Johnson County courthouse in Cleburne in 1913, they blended Classical elements with abstract details made popular by Frank Loyd Wright and others.

Courtesy of *Texas Highways* magazine

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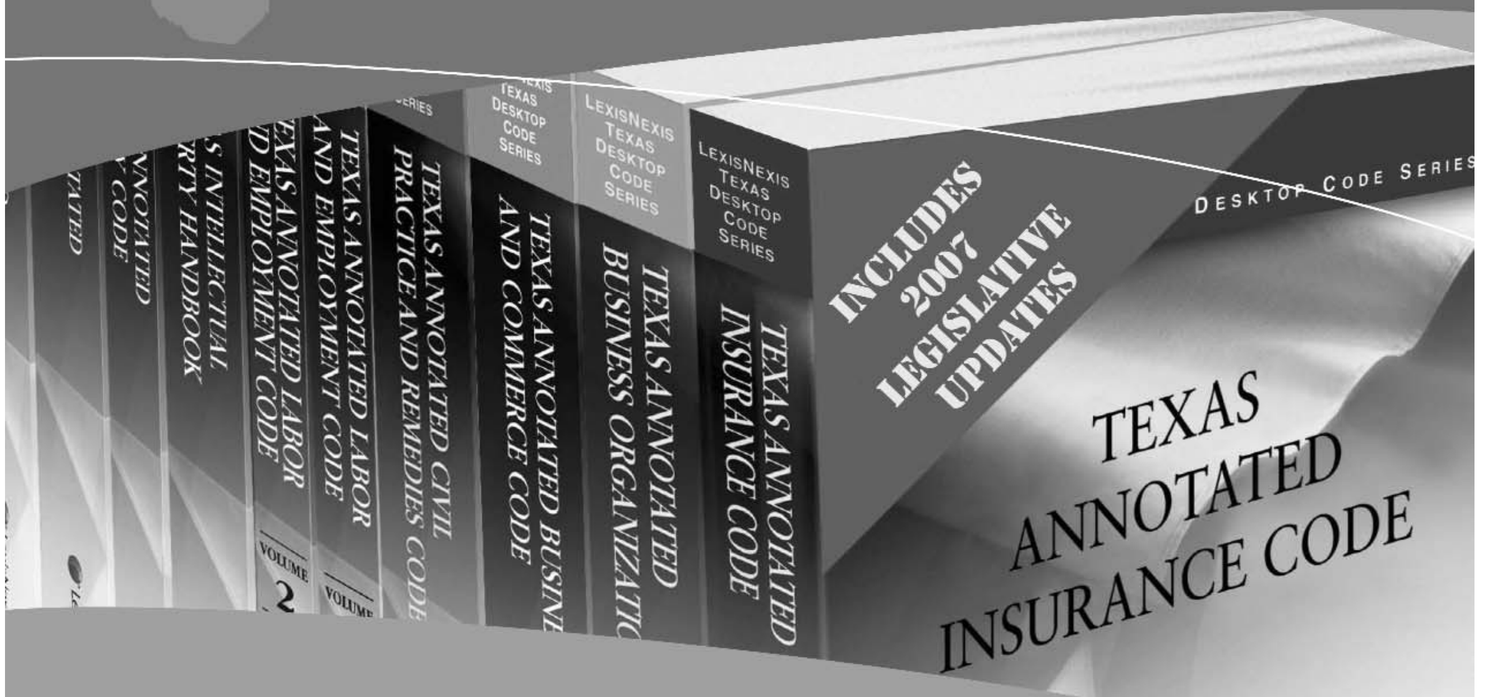

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Comments FROM THE CHAIR

BY KAREN L. KELTZ
Riddle and Williams, P.C.

This is my first opportunity to thank Rusty McMains for his leadership of the section over the past year. I also want to thank Jim Cornell for his continued and generous dedication and contribution to the section. Of course, many thanks go to Chris Martin for his continued effort to produce a Journal of this quality.

This is our tenth anniversary as a section. From our humble beginnings, we have grown to over 1,600 dues paying members. A handful of insurance lawyers formed the section to provide unique services to its members, including high quality CLE. In that regard, I think our section has proven itself incomparable in its efforts. Following the Supreme Court's decisions in any landmark rulings, you can expect an immediate response from the section with a web cast or telephone seminar featuring the key players in that landmark decision.

In addition, we will sponsor or co-sponsor five CLE programs this year. We cosponsored the **12th Annual Insurance Law Institute** with The University of Texas School of Law October 10-12, 2007 at the Hyatt Regency on Town Lake in Austin and the **Advanced Insurance Law Course** with Texas Bar CLE March in Dallas. During the State Bar Annual Meeting in Houston in June, the Section will sponsor an afternoon CLE program. As an effort to stay on the cutting edge, TTLA and the Section will present a joint two-day program in August 2008 in South Padre.

We have added a *pro bono* aspect to the services the section offers. This year, the Section will collaborate with the Consumer Law Section to accomplish the dual goal of promoting pro bono as well as reaching out to the outlying cities to provide CLE programs that might not otherwise be available to lawyers in those areas of Texas. Our plan is to develop a road show CLE format to present 6 hours of free CLE to any lawyer who signs up at the local pro bono agency to donate a number of pro bono hours in exchange for the free CLE. Other lawyers may attend the CLE for a fee. The first program took place December 7 in Edinburg. Please check our website www.txins.org for details.

I encourage our membership to contribute to the Journal or the CLE programs sponsored by the Section. Please contact Section Headquarters at (512) 451-6960 or me if you have an interest in contributing or if you wish to become involved with Council activities. If you are not a member and would like to take advantage of our many member services, please contact Section Headquarters at (512) 451-6960 or admin@txins.org.

Karen Louise Keltz
Chair, Insurance Law Section

BY ANDREW C. WHITAKER
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Rescission of Life, Accident and Health Insurance Policies in Texas – *The Rules Have Changed*

I. INTRODUCTION

For over 70 years, Texas courts have required an insurer seeking to rescind a life, accident, or health insurance policy to show (among other elements) that the insured had the "intent to deceive" the insurer into issuing the coverage.[1] In adopting this requirement, Texas courts have followed the minority view; in most states, it is enough if the misrepresentation (provided it was material) was negligent or careless.[2] Intent to deceive is obviously a high standard to meet, and Texas courts have generally held it cannot be established on summary judgment.[3]

In 1963, the Texas Legislature "charged the Texas Legislative Council with the task of planning and executing a permanent statutory revision to 'clarify and simplify the statutes and to make the statutes more accessible, understandable, and usable.'"[4] As part of this effort, the Texas Legislature recently completed a recodification of the Texas Insurance Code. Although the 2003 session law states that it "is intended as a recodification only," with "no substantive change in law… intended,"[5] the Texas Supreme Court has held that "clear, specific language" in a recodified statute that changes prior law must be applied as written.[6] If the new statutes on misrepresentations by policyholders, which are codified at Texas Insurance Code sections 705.001-.105, are applied as written, then insurers have an excellent argument that significant changes have been made to the elements an insurer must establish to rescind a life, accident, or health insurance policy. These revised statutes give Texas courts the opportunity to rectify their improper imposition of an intent-to-deceive requirement during the first two years a life, accident, or health insurance policy is in force.

II. THE COMMON-LAW REQUIREMENT OF INTENT TO DECEIVE

The requirement of intent to deceive is not a creature of Texas statutory law; instead, it resulted from judicial rulemaking.[7] As the Texas Supreme Court noted in *Union Bankers Insurance Company v. Shelton*, the first case to impose this requirement was the 1888 decision in *Lion Fire Insurance Company v. Starr*.[8] *Starr* was a suit for benefits under a personal property fire insurance policy that contained the following provision: "Any fraud, or attempt at fraud, or any false swearing, on the part of the assured, shall cause a forfeiture of all claim under this policy."[9] The insurer alleged (among other defenses) that the policy was rendered void because the insured committed fraud in submitting his claim.[10] After a jury verdict in favor of the insured for the face amount of the policy, the insurer appealed and alleged error in the trial court's refusal to charge the jury that the policy by its terms was void if the insured's claim was fraudulent.[11] The Texas Supreme Court reversed, finding the parties had expressly agreed that fraud, attempted fraud, or false swearing would result in a forfeiture under the policy.[12] Consequently, the fraud requirement in *Starr* was a creature of the parties, contract, not common law, and the supreme court's actual holding was merely that the insurer was entitled to submit that contractual defense to the jury.

Westchester Fire Insurance Company v. Wagner involved a similar contractual provision.[13] The fire insurance policy at issue in *Wagner* provided it "shall be void… in case of fraud or false swearing by the insured touching any matter relating to this insurance."[14] The insurer denied the named insured's claim on the ground the destroyed goods belonged to a third party, even though the insurer's agent knew of the third party's interest.[15]

Mr. Whitiker is a graduate of Southern Methodist University and The University of Texas School of Law. He is a partner with Figari & Davenport, L.L.P., Dallas, Texas. This article is a truncated, modified, and updated version of Andrew C. Whitaker, Rescission of Life Insurance Policies in Texas – Time to Correct Some Old Errors, 59 Baylor L. Rev. 139 (2007), and is republished with permission. All emphases (unless otherwise indicated) and any errors are the author's.

After concluding that the insurer was bound by the agent's knowledge, the *Wagner* court rejected the insurer's argument that the named insured's sworn statement it owned the destroyed property annulled the policy.[16] Without citation to any authority, the *Wagner* court observed: "It is the settled rule that false statements, to avoid a policy, must have been willful, and with design to deceive or defraud."[17] Since the named insured had informed the insurer's agent of the third party's ownership interest, the *Wagner* court found the trial court did not err in refusing to submit the requested issue.[18]

The intent-to-deceive requirement eventually made its way from the finding of a forfeiture due to an intentional misrepresentation during the claim process[19] to the rescission of an insurance policy due to a misrepresentation in the application process.[20] In *American Central Life Insurance Company v. Alexander*, the insurer denied liability on the ground the insured had made misrepresentations in his application for coverage, and the beneficiary specially excepted to the insurer's failure to allege the misrepresentations were intentionally made.[21] The trial court sustained the special exceptions and entered judgment in the beneficiary's favor, and the court of civil appeals affirmed.[22] In its analysis, the Texas Commission of Appeals cited *Cooley's Briefs on the Law of Insurance*[23] and *Wagner*[24] in support of its assertion that the misrepresentation must have been willful or made fraudulently with the intent to deceive, even though neither of those authorities necessarily compelled that result.[25]

Over time, the intent-to-deceive requirement became increasingly entrenched in Texas law. In *Clark v. National Life & Accident Insurance Company*, the insurer sought to rescind a life insurance policy within two years of its issuance on the ground the insured had made fraudulent misrepresentations in his application.[26] The jury found the insured was in sound health at the time the policy was issued, and the insurer did not request the submission of any issues on its rescission defense.[27] The trial court entered judgment in the beneficiary's favor, but the court of civil appeals reversed, finding that the insurer's fraud defense was established as a matter of law.[28] The Texas Supreme Court disagreed and affirmed the trial court's judgment.[29] As part of its analysis, the supreme court cited *Alexander* and *Wagner* in support of its assertion that "[i]t is the settled rule that, in order to avoid a policy, false statements must have been made willfully and with design to deceive or defraud."[30] After *Clark*, the Texas Supreme Court repeatedly relied on these cases in requiring insurers seeking rescission to prove intent.[31]

For the most part, these courts did not predicate their imposition of an intent requirement on the Texas statutes governing rescission, which is not surprising in light of the fact that those statutes did not expressly require such a showing. For example, Texas Insurance Code article 21.16, which was entitled "Misrepresentation by Policyholder," required a showing of materiality but was silent on the issue of intent:

> Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, *unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable,* and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case.[32]

In turn, Texas Insurance Code article 21.17 was entitled "Notice of Misrepresentation" and did not require a showing of intent:

> In all suits brought upon insurance contracts or policies hereafter issued or contracted for in this State, no defense based upon misrepresentations made in the applications for, or in obtaining or securing the said contract, shall be valid, unless the defendant shall show on the trial that, within a reasonable time after discovering the falsity of the representations so made, it gave notice to the assured, if living, or, if dead, to the owners or beneficiaries of said contract, that it refused to be bound by the contract or policy; provided, that ninety days shall be a reasonable time; provided, also, that this article shall not be construed as to render available as a defense any immaterial misrepresentation, nor to in any wise modify or affect Article 21.16 of this code.[33]

On the other hand, Texas Insurance Code article 21.19, which was entitled "Misrepresenting Loss or Death" and addressed misrepresentations made during the claim process, expressly required that the misrepresentation be both material *and* "fraudulently made":

> Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the same shall be void or voidable, if any misrepresentations or false statements be made in proofs of loss or death, as the case may be, shall be of no effect, and shall not constitute any defense to any suit brought upon such con-

> tract or policy, *unless it be shown upon the trial of such suit that the false statement made in such proofs of loss or death was fraudulently made and misrepresented a fact material to the question of the liability of the insurance company* upon the contract of insurance sued on, and that the insurance company was thereby misled and caused to waive or lose some valid defense to the policy.[34]

As such, neither article 21.16 nor article 21.17 (both of which addressed misrepresentations in the *application* process) required an insurer to prove intent, whereas article 21.19 (which addressed misrepresentations in the *claim* process) expressly required a showing of fraud. As noted above, however, both the Texas Supreme Court and the Fifth Circuit imposed an intent requirement for rescissions.[35]

Similarly, these courts did not predicate the intent-to-deceive requirement on the express terms of the incontestable clause. Like many states, Texas requires that life, accident, and health insurance policies contain certain provisions,[36] including a clause addressing when and how an insurer may seek to void the policy.[37] *Union Bankers Insurance Company v. Shelton* involved an insurer's rescission of a health insurance policy,[38] and at the time of the policy's issuance, all Texas accident and sickness policies had to contain the following provision:

> Time Limit on Certain Defenses: (a) After two years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period.
>
> (The foregoing policy provision shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during such initial two-year period, nor to limit the application of Section 3(B), (1), (2), (3), (4), and (5) in the event of misstatement with respect to age or occupation or other insurance).[39]

On the application, the insured denied he had ever been treated for or had any known indications of any disorders of his skeletal or muscular systems.[40] Seven months after the policy was issued, the insured underwent total hip replacement surgery to correct necrosis in his left hip joint, and the insurer cancelled the policy due to his failure to disclose his hip problems.[41] The jury answered all of the questions against the insured, except it failed to find he intended to deceive the insurer.[42] The trial court nonetheless entered judgment in the insurer's favor, but the court of appeals reversed and remanded the case for a new trial on the insured's bad-faith claim.[43]

In its appeal to the Texas Supreme Court, the insurer sought to avoid the jury's no-intent finding by arguing that the first paragraph of article 3.70-3(A)(2)(a) implied an insurer could cancel a health insurance policy within two years of its issuance on the basis of innocent (i.e., non-fraudulent) misrepresentations.[44] The Texas Supreme Court disagreed, finding (in a plurality decision) that the second paragraph of article 3.70-3(A)(2)(a), by its terms, meant that the first paragraph did not affect the determination of whether the insurer must prove intent during the first two years a policy was in force.[45] The supreme court then held, in reliance on *Starr, Clark, Allen*, and *Mayes*, that the common law of Texas required a showing of intent during the first two years.[46]

In *Alexander*, the Texas Commission of Appeals found support for the imposition of an intent-to-deceive requirement in Texas Revised Civil Statutes article 4732, which required all life insurance policies to contain a provision stating that "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."[47] Prior to the adoption of this statute's predecessor in 1909,[48] Texas courts applied the strict obligations of warranties, which permitted an insurer to avoid a policy where *any* statement of the insured identified as a warranty was not literally and exactly true.[49] Not surprisingly, insurers sought to use this doctrine to void coverage on the basis of misstatements that were irrelevant to the issue of whether the coverage would have been issued in the first place.[50] For example, in *Blackstone v. Kansas City Life Insurance Company*, the insurer sought to rescind two life insurance policies on the ground the insured had misrepresented his place of birth and residence and the number of his brothers and sisters, none of which had anything to do with his insurability.[51]

Upon scrutiny, however, this provision does not support the imposition of the intent-to-deceive requirement. In effect, this provision equated the making of a fraudulent representation with a breach of a warranty, both of which permitted an insurer to avoid the policy. Importantly, if an insured's statement was treated as a warranty, its falsity served to void the policy without regard to whether the statement was material.[52] Properly read, article 4732 thus permitted an insurer to rescind a life insurance policy on the basis of a fraudulent statement that was *not* material. In turn, the rescission statutes in force at the time (such as Texas Revised Civil Statutes article 5043) permitted a rescission on the basis of a material misrepresentation (without expressly requiring a showing of intent).[53] By allowing rescissions upon a showing of either a fraudulent, non-material representation (which was effectively a warranty pursuant to article 4732) or a material misrepresentation

(which under article 5043 need not have been intentionally made), Texas law would have been consistent with the majority rule, which has long permitted rescissions on the basis of a misrepresentation that was fraudulent *or* material.[54] Texas courts nonetheless adopted, on the basis of questionable analysis, the minority position that an insured's misrepresentation must be both fraudulent *and* material before an insurer could rescind his coverage.

III. THE RECODIFICATION OF THE TEXAS INSURANCE CODE

By virtue of the recent recodification of the Texas Insurance Code, significant changes have been made to Texas law on the rescission of insurance policies. In 2003, the Texas Legislature completed its revision of the Texas Insurance Code, and the session law containing this recodification states: "This Act is intended as a recodification only, and no substantive change in law is intended by this Act."[55] Notwithstanding this admonition, the Texas Supreme Court has held that courts must give effect to a recodified statute that is unambiguous, even if it results in a change in the law.[56] In the event of a conflict, the latter enactment controls: "We are compelled to conclude that when, as here, specific provisions of a 'nonsubstantive' codification and the code as a whole are direct, unambiguous, and cannot be reconciled with prior law, the codification rather than the prior, repealed statute must be given effect."[57] If the recodified statutes are given their plain meaning, insurers have an excellent argument that a showing of intent is not required to rescind a life, accident, or health insurance policy that has been in force for less than two years.

Effective April 1, 2005, the Texas Legislature adopted Title 5 to the Texas Insurance Code.[58] Indicative of the concern with fraud in the insurance area,[59] Subtitle F is entitled "Insurance *Fraud*," and its first four chapters (chapters 701-704) are entitled "Insurance *Fraud* Investigations,"[60] "Motor Vehicle Theft and Motor Vehicle Insurance *Fraud* Reporting,"[61] "Covered Entity's *Antifraud* Action,"[62] and "*Antifraud* Programs."[63] In contrast to these repeated references to fraud, chapter 705 (which contains the recodified rescission requirements) is entitled "*Misrepresentations* by Policyholders."[64]

Chapter 705 contains three subchapters: general provisions applicable to all insurance policies,[65] special provisions applicable to life, accident, and health insurance policies,[66] and special provisions applicable to only life insurance policies.[67] The recodified statutes establish the following requirements with respect to all insurance policies:

> • to establish a policy is void or voidable, the insurer must show the matter misrepresented "(1) was material to the risk; or (2) contributed to the contingency or event on which the policy became due and payable," both of which are questions of fact;[68] and
>
> • the insurer may use a misrepresentation defense "only if the defendant shows at trial that before the 91st day after the date the defendant discovered the falsity of the representation, the defendant gave notice that the defendant refused to be bound by the policy" to the insured or his beneficiaries.[69]

These requirements do not apply to a life insurance policy "(1) that contains a provision making the policy incontestable after two years or less; and (2) on which premiums have been duly paid."[70] As such, if a life insurance policy provides it is incontestable after two years or less, the insurer need not give the 90-day notice required by section 705.005; otherwise, and always with respect to non-life insurance policies, the insurer must give notice, within 90 days of discovering the falsity of the insured's representation, that it will not be bound by the policy.

In turn, section 705.051 (which applies to only life, accident, and health insurance policies) provides:

> A misrepresentation in an application for a life, accident, or health insurance policy does not defeat recovery under the policy unless the misrepresentation:
>
> (1) is of a material fact; and
>
> (2) affects the risks assumed.[71]

Since neither this section nor any of the other sections articulating the rescission requirements expressly refer to intent, an insurer seeking to rescind a life, accident, or health insurance policy can argue that a material misrepresentation that was made negligently or carelessly is enough.[72] If intent was to be required, the Texas Legislature could have easily so stated, and it would defeat the purpose of a recodification to require parties to analyze the common law to retrieve this requirement.[73]

Finally, section 705.103 (which applies to only life insurance policies) states that such a policy "must be accompanied by a copy of: (1) the policy application; and (2) any questions and answers given in connection with the application."[74] In turn, section 705.104 provides:

A defense based on a misrepresentation in the application for, or in obtaining, a life insurance policy on the life of a person in or residing in this state is not valid or enforceable in a suit

brought on the policy on or after the second anniversary of the date of issuance of the policy if premiums due on the policy during the two years have been paid to and received by the insurer, unless:

> (1) the insurer has notified the insured of the insurer's intention to rescind the policy because of the misrepresentation; *or*
>
> (2) it is shown at the trial that the misrepresentation was:
> (A) *material to the risk; and*
> (B) *intentionally made.*[75]

By its terms, section 705.104 permits an insurer to rescind a life insurance policy more than two years after its issuance by showing either (1) it gave notice to the insured of its intent to rescind or (2) the misrepresentation was material to the risk and intentionally made. By permitting the rescission, upon a showing of an intentionally made misrepresentation, of a life insurance policy that has been in force for over two years, section 705.104 is consistent with (albeit stated differently than) Texas Insurance Code section 1201.208(a), which is the successor statute to the provision at issue in *Shelton* and permits the rescission of an individual accident and health insurance policy that has been in force for two years upon a showing of "a fraudulent misstatement."[76]

In addition, section 705.104 (with its express reference to intent), when read together with section 705.051 (which is silent on the issue of intent), strongly suggests that intent need not be shown to rescind a life, accident, or health insurance policy that has been in force for less than two years. Admittedly, the Texas Supreme Court rejected a comparable argument with respect to a health insurance policy in *Shelton*; importantly, however, the second paragraph of the now-repealed Texas Insurance Code article 3.70-3(A)(2)(a), which was the provision at issue in *Shelton*, stated that the fraud exception in the first paragraph "shall not be construed as to affect any legal requirement for avoidance of a policy… during such initial two-year period."[77] On the other hand, section 705.051 now sets forth the "legal requirement[s] for avoidance of a [life, accident, or health insurance] policy… during the initial two-year period"[78] and does not requiring a showing of intent. Simply put, the Texas Legislature is capable of imposing an intent requirement where it sees fit, and its decision to require intent in section 705.104 (which applies only to life insurance policies that have been in force for two years) but not in section 705.051 must be acknowledged and given meaning.[79]

Further support for the conclusion that intent need not be shown to rescind a life, accident, or health insurance policy that has been in force for less than two years may be found in other recent enactments. For example, both section 705.003, which concerns misrepresentations in proof of loss or death, and section 705.004, which concerns misrepresentations in a policy application, establish a general rule that a policy provision stating a misrepresentation makes the policy void or voidable has no effect and is not a defense in a suit brought on the policy.[80] With respect to a misrepresentation in proof of loss or death, the general rule is inapplicable if the insurer establishes the misrepresentation was (among other requirements) "fraudulently made."[81] Tellingly, a showing of fraud is *not* required with respect to a misrepresentation in a policy application; rather, it is enough if the insurer establishes the misrepresentation was "material to the risk" or "contributed to the contingency or event on which the policy became due and payable."[82]

In turn, section 1201.272, which is entitled "False Statements," provides:

> The falsity of a statement in an application for an individual accident and health insurance policy does not bar a right to recovery under the policy unless the statement materially affected the acceptance of the risk of the hazard assumed by the insurer.[83]

Tellingly, this provision (which applies to the application process) does not impose an intent requirement, whereas section 1202.051(c)(2) (which applies to the cancellation of an individual health insurance policy) permits an insurer to decline to renew or continue an individual health insurance policy "for fraud or intentional misrepresentation."[84]

All told, if the terms of chapter 705 are applied as written, a showing of intent is not required to rescind a life, accident, or health insurance policy that has been in force less than two years.

IV. CONCLUSION

Many actions have unintended consequences.[85] Although the Texas Legislature may not have intended to change Texas law on the rescission of life, accident, and health insurance policies, the recodification of the Texas Insurance Code has had that effect. If courts follow the Texas Supreme Court's admonition that recodified statutes are to be applied as written, even if the resulting interpretation changes the law, then the plain language of chapter 705 of the Texas Insurance Code confirms that an insurer no longer must establish an insured's intent in seeking to rescind a life, accident, or health insurance policy that has been in force for less than two years. In this recodification, the Texas Legislature has moved Texas law in line with that of the majority of other jurisdictions, which permit the rescission of an insurance policy on the basis of a misrepresentation that is either material *or* fraudulent.

1. *See Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 281-82 (Tex. 1994) (observing that "[t]he proposition that an insured's intent to deceive is likewise required is well established in the common law of this state"). In *Shelton*, the Texas Supreme Court cited *Lion Fire Insurance Co. v. Starr*, 12 S.W. 45, 46 (Tex. 1888), which involved a personal property fire insurance policy, as the first case to announce this rule, and in 1933, the Texas Commission of Appeals extended this requirement to life insurance policies. *See American Cent. Life Ins. Co. v. Alexander*, 56 S.W.2d 864, 866 (Tex. Comm'n App. 1933, judgm't adopted). Both the Texas Supreme Court and the Fifth Circuit have held that an insurer seeking to rescind an insurance policy must plead and prove five elements: (1) the making of a representation, (2) the falsity of the representation, (3) reliance thereon by the insurer, (4) the intent to deceive on the part of the insured in making same, and (5) the materiality of the representation. *See Mayes v. Massachusetts Mut. Life Ins. Co*., 608 S.W.2d 612, 616 (Tex. 1980); *Lee v. National Life Assur. Co. of Canada*, 632 F.2d 524, 527 (5th Cir. 1980). These requirements were apparently first articulated in this manner in *General American Life Insurance Company v. Martinez*, 149 S.W.2d 637, 640-41 (Tex. Civ. App. – El Paso 1941, writ dism'd judgm't cor.).

2. *See Shelton*, 889 S.W.2d at 285 (Phillips, C.J., concurring) (observing that Texas has "adopted the minority position that intent to deceive is required for cancellation of an insurance policy on the ground of a misrepresentation"); *see also Tingle v. Pacific Mut. Ins. Co*., 837 F. Supp. 191, 192 (W.D. La. 1993) (noting that the majority rule is that "'a material misrepresentation need not have been made fraudulently in order to be available to avoid a policy'") (quoting 45 C.J.S. INSURANCE § 548 (1993)); William H. Danne, Jr., *Modern Status Regarding Materiality and Effect of False Statement by Insurance Applicant as to Previous Insurance Cancellations or Rejections*, 66 A.L.R.3d 749, 781-82 (1975) ("The prevailing view in the absence of a statute to the contrary is that a materially false warranty or representation by an insurance applicant will defeat recovery on the policy even if made in good faith or as the result of inadvertence or ignorance."). Similarly, federal common law under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461 (2000), does not require that the misrepresentation be fraudulent; rather, it is enough if the misrepresentation was material. *See Tingle*, 837 F. Supp. at 193.

3. *See Cartusciello v. Allied Life Ins. Co. of Tex.*, 661 S.W.2d 285, 288 (Tex. App. – Houston [1st Dist.] 1983, no writ); *see also Flowers v. United Ins. Co. of Am*., 807 S.W.2d 783, 786 (Tex. App. – Houston [14th Dist.] 1991, no writ) (noting that knowledge of one's health condition is insufficient to presume intent as a matter of law); *Estate of Diggs v. Enterprise Life Ins. Co*., 646 S.W.2d 573, 576 (Tex. App. – Houston [14th Dist.] 1982, writ ref'd n.r.e.) (reversing summary judgment where the court determined it could not "presume an intent to deceive from the fact that [the insured], with a long history of heart ailments, made false statements on his application for insurance"). Texas courts have suggested, however, that intent may be established as a matter of law where there is strong evidence of collusion between the insured and the agent. *See Lee*, 632 F.2d at 528; *Washington v. Reliable Life Ins. Co.*, 581 S.W.2d 153, 160 (Tex. 1979).

4. *Fleming Foods of Tex., Inc. v. Rylander,* 6 S.W.3d 278, 283 (Tex. 1999) (quoting TEX. GOV'T CODE § 323.007(a)).

5. Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 27, 2003 Tex. Gen. Laws 3611, 4139.

6. *Fleming Foods*, 6 S.W.3d at 284; *see also State Farm Life Ins. Co. v. Martinez*, 216 S.W.3d 799, 804 (Tex. 2007) (noting that, "[w]hile we generally presume the Legislature accepts judicial interpretations of a statute by reenacting it without substantial change, we do not make that presumption when there have been substantial changes, or when it would contradict the statute's plain words" (footnotes omitted)).

7. *See S. Leigh Moore, A Promising Alternative to Intent to Deceive: Intent to Induce Issuance*, 48 BAYLOR L. REV. 273, 278 (1996) (observing that "[t]he intent to deceive requirement was not born out of any certain case; rather, the requirement is a creature of misunderstandings and misconstruction that grew into accepted law through the desire of courts to uphold lower courts' decisions if at all possible").

8. *Shelton*, 889 S.W.2d at 281-82 (citing *Starr*, 12 S.W. at 46).

9. *Starr*, 12 S.W. at 46.

10. *Id*. at 45.

11. *Id*. at 45-46.

12. *Id*. at 46.

13. 57 S.W. 876, 877 (Tex. Civ. App. 1900, writ ref'd).

14. *Id*.

15. *Id*.

16. *Id*.

17. *Id*.

18. *Id*. at 878.

19. *Starr*, 12 S.W.at 46.

20. *American Cent. Life Ins. Co. v. Alexander,* 56 S.W.2d 864, 866 (Tex. Comm'n App. 1933, judgm't adopted).

21. *Id*. at 865-66.

22. *Id*. at 865 (citing *American Cent. Life Ins. Co. v. Alexander,* 39 S.W.2d 86, 86, 90 (Tex. Civ. App. – Amarillo 1931, writ granted)).

23. *Id*. at 866 (citing 3 ROGER W. COOLEY, BRIEFS ON THE LAW OF INSURANCE 1988 (1905)).

24. *Id*. (citing *Westchester Fire Ins. Co. v. Wagner,* 57 S.W. 876 (Tex. Civ. App. 1900, writ ref'd)).

25. *See* Moore, *supra* note 7, at 279-81 (analyzing *Wagner*, 57 S.W. at 877; *Alexander*, 56 S.W.2d at 866).

26. 200 S.W.2d 820, 821 (Tex. 1947).

27. *Id*. at 822.

28. *Id*. at 821.

29. *Id*. at 824.

30. *Id.* at 822.

31. *See Shelton,* 889 S.W.2d at 281-82 (citing *Clark*); *Mayes*, 608 S.W.2d at 616 (citing *Clark*); *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604, 607-08 (Tex. 1964) (citing *Clark, Alexander*, and *Wagner*). Although this element is typically characterized as the "intent to deceive," the Texas Supreme Court observed in *Shelton* that "the utterance of a *known* false statement made with intent to induce action ... is equivalent to an intent to deceive." *Shelton*, 889 S.W.2d at 282 n.7 (emphasis and omission in original); *see also Haney v. Minnesota Mut. Life Ins. Co.*, 505 S.W.2d 325, 328 (Tex. Civ. App. – Houston [14th Dist.] 1974, writ ref'd n.r.e.) (stating that "[t]he jury findings of the making of known false statements, with intent to induce action on the part of the insurance company, amounted to findings of an intent to deceive"). Intent to induce action represents an easier test for an insurer to satisfy, as the jury is more likely to find the insured intended to induce the insurer to act than he intended to deceive it. Moreover, the insurer can argue that language in the application stating the insured is requesting the insurer to issue coverage on the basis of his disclosures enables the insurer to establish intent as a matter of law.

32. TEX. INS. CODE art. 21.16 (repealed 2003). In the same vein, TEXAS INSURANCE CODE article 21.18 was entitled "Immaterial Misrepresentation" and provided:

> No recovery upon any life, accident or health insurance policy shall ever be defeated because of any misrepresentation in the application which is of an immaterial fact and which does not affect the risks assumed.

Id. art. 21.18, *repealed by* Act of May 20, 2003, 78th Leg, R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138.

33. *Id.* art. 21.17 (repealed 2003).

34. *Id.* art. 21.19 (repealed 2003).

35. *See Lee*, 632 F.2d at 527; *Mayes*, 608 S.W.2d at 616.

36. *See generally* TEX. INS. CODE §§ 1101.001-.013 (life insurance policies); *id.* §§ 1201.201-.227 (individual accident and health insurance policies).

37. *See id.* § 1101.006(a) (life insurance policies); *id.* § 1201.208(a) (individual accident and health insurance policies).

38. 889 S.W.2d 278, 281-82 (Tex. 1994).

39. Act of June 6, 1955, 54th Leg., R.S., ch. 397, § 3(a)(2), 1955 Tex. Gen. Laws 1044, 1046, *amended by* Act of Sept. 19, 1969, 61st Leg., C.S., ch. 11, § 1, 1969 Tex. Gen. Laws 118, 118, *repealed by* Act of May 22, 2003, 78th Leg, R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138 (current version at TEX. INS. CODE § 1201.208(a)). Although life insurers have not been allowed to include a comparable incontestable clause, they arguably could have rescinded, upon a showing of fraud, a life insurance policy that had been in force for over two years if courts had given meaning to the latter part of article 21.35, which applied by its terms to "every contract or policy of *life* insurance" and provided:

> The provisions of Articles 21.16, 21.17, and 21.19 of this code shall not apply to policies of life insurance in which there is a clause making such policy indisputable after two (2) years or less, provided premiums are duly paid; provided further, that *no defense based upon misrepresentation made in the application for, or in obtaining or securing, any contract of insurance upon the life of any person being or residing in this State shall be valid or enforceable in any suit brought upon such contract two (2) years or more after the date of its issuance, when premiums due on such contract for the said term of two (2) years have been paid to, and received by, the company issuing such contract, without notice to the assured by the company so issuing such contract of its intention to rescind the same on account of misrepresentation so made, unless it shall be shown on the trial that such misrepresentation was material to the risk and intentionally made.*

Act of May 22, 1989, 71st Leg., R.S., ch. 656, § 1, 1989 Tex. Gen. Laws 2163, 2163 (repealed 2003).

40. *Shelton*, 889 S.W.2d at 279.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 279-80.

45. *Id.* at 281.

46. *Id.* at 281-82.

47. 56 S.W.2d at 866 (quoting Act of March 22, 1909, 31st Leg., R.S., ch. 108, § 22, 1909 Tex. Gen. Laws 192, 200 (current version at TEX. INS. CODE § 1101.007)).

48. Act of March 22, 1909, 31st Leg., R.S., ch. 108, § 22, 1909 Tex. Gen. Laws 192, 200.

49. *See, e.g., Supreme Lodge Knights & Ladies of Honor v. Payne*, 108 S.W. 1160, 1162 (Tex. 1908) ("The fact warranted, being untrue, rendered the certificate void."); *Kansas Mut. Life Ins. Co. v. Pinson,* 63 S.W. 531, 531 (Tex. 1901) (noting "the general rule that the breach of warranty in an insurance policy works a forfeiture of the contract").

50. *See, e.g., Pinson*, 63 S.W. at 531-32 (finding that a policy was void for breach of warranty where the insured misstated the ages of his five sisters by a few years).

51. 174 S.W. 821, 821-23 (Tex. 1915).

52. *See Brotherhood of R.R. Trainmen Ins. Dep't of Cleveland, Ohio v. Green,* 182 S.W.2d 804, 804 (Tex. 1944) ("Whether material or not to the risk, the representations were warranties, and since at least some of them were admittedly untrue, they avoided the policy."); *Goddard v. East Tex. Fire Ins. Co.,* 1 S.W. 906, 907 (Tex. 1886) (observing that, if a given clause was a warranty, "the law exacts a compliance with their terms, according to their true intent and meaning, whether material or not, or whether known to the assured or not, if he had the opportunity; and it was his duty, under the circumstances, to acquaint himself with them").

53. *See* Act of March 27, 1903, 28th Leg., R.S., ch. 69, § 1, 1903 Tex. Gen. Laws 94, 94 (current version at TEX. INS. CODE § 705.004 (requiring the party seeking rescission to show "that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event upon which said policy became due and payable")).

54. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981) ("If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."). According to one com-

mentator, most material misrepresentations are intentionally made. *See* Robert R. Googins, *Fraud and the Incontestable Clause: A Modest Proposal for Change,* 2 Connecticut Ins. L.J. 51, 63 (1996) ("Of course, it would have to be an unusual case for a material misrepresentation of a manifest condition to be other than intentional.").

55. Act of May 22, 2003, 78th Leg., R.S., ch. 1274, § 27, 2003 Tex. Gen. Laws 3611, 4139.

56. *See Fleming Foods of Tex., Inc. v. Rylander,* 6 S.W.3d 278, 284 (Tex. 1999) (holding that "clear, specific language" in a recodified statute that changes prior law must be applied as written, even though the enabling act provided that "no substantive change in the law is intended").

57. *Id*. at 286. Although the Texas Legislature disagreed with this result and passed a bill in 2001 that would have overruled *Fleming Foods*, Governor Rick Perry vetoed it. *See* Veto Message of Gov. Perry, Tex. H.B. 2809, H.J. of TEX., 77th Leg., R.S. (2001).

58. Act of May 22, 2003, 78th Leg., R.S., ch. 1274, §§ 1-28, 2003 Tex. Gen. Laws 3611, 3611-4139. As part of this recodification, articles 21.16, 21.17, 21.18, 21.19, and 21.35 (among other articles) were repealed effective April 1, 2005. Id. § 26(a)(1), 2003 Tex. Gen. Laws at 4138.

59. According to the Texas Department of Insurance, insurance fraud "is one of the most costly white collar crimes in America, ranking second to tax evasion," and may have an annual total cost in excess of $120 billion. Texas Dept. of Insurance Facts and Frequently Asked Questions, http://www.tdi.state.tx.us./fraud/faq.html (last visited August 19, 2007). Consistent with its focus on insurance fraud, the Texas Legislature recently amended Texas Penal Code section 35.02 to make it a state jail felony to commit application-related fraud after September 1, 2005. TEX. PEN. CODE § 35.02(a-1), (d). The Texas Legislature had criminalized claim-related fraud in 1995. *See id*. § 35.02(a), added by Act of May 25, 1995, 74th Leg., R.S., ch. 621, § 1, 1995 Tex. Gen. Laws 3483, 3483. Similarly, any person who determines or reasonably suspects a fraudulent insurance act (which now includes application-related fraud) has been or is about to be committed must report the information in writing within 30 days to the insurance fraud unit of the Texas Department of Insurance. TEX. INS. CODE § 701.051(a).

60. TEX. INS. CODE §§ 701.001-.154.

61. *Id*. §§ 702.001-.006.

62. *Id*. §§ 703.001-.104.

63. *Id*. §§ 704.001-.054.

64. *Id*. §§ 705.001-.105. Admittedly, "[t]he heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute." TEX. GOV'T CODE § 311.024. The titles chosen by the Texas Legislature, while not controlling, are nonetheless instructive.

65. TEX. INS. CODE §§ 705.001-.005.

66. *Id*. § 705.051.

67. *Id*. §§ 705.101-.105.

68. *Id*. §§ 705.004(b)-(c). This requirement is generally consistent with the materiality requirement in the now-repealed article 21.16. *See* Insurance Code, 52d Leg., R.S., ch. 491, § 2(b), 1951 Tex. Gen. Laws 868, 1074 (repealed 2003). Under this disjunctive provision, an insurer must prove either the misrepresentation was material to its decision to issue coverage or the undisclosed condition contributed to the insured's death. *See Bettes v. Stonewall Ins. Co.,* 480 F.2d 92, 95 (5th Cir. 1973) (rejecting the plaintiff's claim that a misrepresentation must both be material and contribute to the loss); *Fireman's Fund Ins. Co. v. Wilburn Boat Co*., 300 F.2d 631, 644 (5th Cir.) ("It is obvious that a fact can be material to the risk without contributing to bring about the destruction of the insured's property."), *cert. denied*, 370 U.S. 925 (1962).

69. TEX. INS. CODE § 705.005(b). This requirement is generally consistent with the 90-day notice requirement in the now-repealed article 21.17. *See* Insurance Code, 52d Leg., R.S., ch. 491, § 2(b), 1951 Tex. Gen. Laws 868, 1075 (repealed 2003). Under section 705.005, the insurer must establish the date it discovered the falsity of the insured's representation and that it gave notice to the insured or his beneficiary less than 91 days thereafter of its refusal to be bound by the policy. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 780 S.W.2d 417, 425 (Tex. App. – Texarkana 1989, writ granted) (interpreting article 21.17), *aff'd*, 811 S.W.2d 552 (Tex. 1991). The notice must state the insurer refuses to be bound by the policy; an interim notice the insurer is investigating a potential misrepresentation is not enough. *See id*. (finding that the insurer's letter stating it was investigating the claim did not satisfy the notice requirement in article 21.17).

70. TEX. INS. CODE § 705.105. This provision is generally consistent with the second part of the now-repealed article 21.35. *See* Insurance Code, 52d Leg., R.S., ch. 491, § 2(e), 1951 Tex. Gen. Laws 868, 1084-85 (repealed 2003).

71. *Id*. § 705.051. These requirements are generally consistent with the requirements in the now-repealed article 21.18. *See* Insurance Code, 52d Leg., R.S., ch. 491, § 2(b), 1951 Tex. Gen. Laws 868, 1075 (repealed 2003).

72. *See Old Am. County Mut. Fire Ins. Co. v. Sanchez,* 149 S.W.3d 111, 115 (Tex. 2004) (observing that, "because we presume that every word of a statute has been included or excluded for a reason, we will not insert requirements that are not provided by law"); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (observing that "we believe every word excluded from a statute must also be presumed to have been excluded for a purpose"). An insurer making this argument should, however, nonetheless be prepared to establish the insured's intent if the court (notwithstanding the recodification) elects to impose that requirement as a matter of Texas common law.

73. *See City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 358 (Tex. 2000) ("Courts are not responsible for omissions in legislation, but must take statutes as they find them."); *see also Fort Worth & D.C. Ry. Co. v. Welch,* 183 S.W.2d 730, 736 (Tex. Civ. App. – Amarillo 1944, writ ref'd) (noting that a statutory revision "implies a re-examination and restatement of the law in a corrected or improved form with or without material changes" and that "[i]t will be presumed that… the Legislature proceeded diligently and with full knowledge of the consequences of its act").

74. TEX. INS. CODE § 705.103. These requirements are generally consistent with the attachment requirement in the first part of the now-repealed article 21.35. *See* Insurance Code, 52d Leg., R.S., ch. 491, § 2(e), 1951 Tex. Gen. Laws 868, 1084-85 (repealed 2003).

75. *Id*. § 705.104.

76. *Id*. § 1201.208(a).

77. Act of May 24, 1955, 54th Leg., R.S., ch. 397, § 3(a)(2), 1955 Tex. Gen. Laws 1044, 1046, *repealed by* Act of May 22, 2003, 78th Leg, R.S., ch. 1274, § 26(a)(1), 2003 Tex. Gen. Laws 3611, 4138.

78. TEX. INS. CODE § 1201.208(b)(1).

79. *See Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001) ("Ordinarily where the Legislature has used a term in one section of a statute and excluded it in another, we will not imply the term where it has been excluded."); *see also Smith v. Baldwin,* 611 S.W.2d 611, 616 (Tex. 1980) (observing that, where proof of intent was required by some sections of the DTPA but not by others, intent would not be implied where excluded).

80. TEX. INS. CODE §§ 705.003(a), 705.004(a).

81. *Id.* § 705.003(b). This requirement is generally consistent with the fraud requirement in the now-repealed article 21.19. *See* Insurance Code, 52d Leg., R.S., ch. 491, § 2(b), 1951 Tex. Gen. Laws 868, 1075 (repealed 2003).

82. *Id.* § 705.004(b).

83. *Id.* § 1201.272.

84. *Id.* § 1202.051(c)(2).

85. *See* Rob Norton, *Unintended Consequences,* THE CONCISE ENCYCLOPEDIA OF ECONOMICS, http://www.econlib.org/library/Enc/Unintended Consequences.html (last visited August 19, 2007) ("The law of unintended consequences, often cited but rarely defined, is that actions of people – and especially of government – always have effects that are unanticipated or 'unintended.").

STATE BAR OF TEXAS
ANNUAL MEETING
JUNE 26, 2008
HOUSTON, TEXAS

INSURANCE LAW SECTION
ANATOMY OF AN INSURANCE CASE
3.0 HOURS CLE/1.0 HOURS ETHICS

COURSE DIRECTOR, Karen Keltz **EXECUTIVE DIRECTOR, Donna Passons**

1:30 pm **Section Business Meeting**

CLE PROGRAM

2:00 pm **Introductory Remarks and Moderator**
Brian Martin, Houston

2:05 pm **Anatomy of an Insurance Policy**
Linda Dedman, Dallas

2:35 pm **Getting it Started: Selection of**
(.5 Ethics) **Independent Counsel**
Trevor Hall, Amarillo

3:05 pm **BREAK**

3:25 pm **Where Do We Go From Here:**
The Duty to Defend/Extrinsic Evidence
Michael Huddleston, Dallas
Karen Keltz, Dallas

3:45 pm **Preparing the Insurance Witness**
(.5 Ethics) Meloney Perry, Dallas

4:10 pm **Mechanics of Auto, Liability, Property Insurance**
Bill Chriss, Austin
Janet Colaneri, Arlington

4:40 pm **Who Pays: The Right to Reimbursement**
Robert Perry, Dallas

5:05 pm **What the Supreme Court Had to Say this Year**
Brian Blakeley, San Antonio
Lee Shidlofsky, Austin

BY PAMELLA A. HOPPER
NICKENS KEETON LAWLESS FARRELL & FLACK LLP; AUSTIN, TEXAS

Liability Insurance Coverage for Global Warming: *An Inconvenient Truth for Carriers*

In the wake of the recent broad scientific consensus that global warming is a real phenomenon, and one caused by humans, litigation against carbon dioxide emitters is heating up. Whether these suits ultimately will be widespread and continue for years to come remains to be seen, but until they burn out, policyholders will have to defend against them – certainly a costly endeavor. Policyholders will of course be counseled to seek a defense and indemnification from their insurance carriers, which inevitably will give rise to global warming insurance coverage litigation. Part I of this article provides a summary of global warming tort litigation to date. Part II provides an overview of the types of coverage issues that likely will arise from global warming tort litigation.

I. GLOBAL WARMING TORT LITIGATION

Numerous suits involving global warming currently are pending, and more are sure to follow in the wake of the Supreme Court's recent decision in *Massachusetts v. EPA*.[1] In this case, the Court found that the State of Massachusetts had standing to challenge the EPA's prior determination that the EPA did not have authority to regulate greenhouse gas emissions. In finding that Massachusetts had standing, the majority stated: "Because the Commonwealth owns a substantial portion of the state's coastal property, it has alleged a particularized injury in its capacity as a landowner."[2] The Court found that Massachusetts, as a large landowner, faced actual or imminent injury from climate change attributable to global warming. Further, the Court found that greenhouse gases qualify as pollutants under the Clean Air Act, and that the EPA does have authority to monitor vehicle emissions.[3]

Because *Massachusetts v. EPA* arguably confers standing on large landholders, we can expect to see a surge in global warming tort litigation, including actions by states and cities across the country against power companies, automakers, and oil and coal producers, as well as suits brought by individual plaintiffs against the same types of defendants. Some believe global warming litigation will be short-lived and are likening it to Y2K. But most commentators are calling it the next asbestos, or something akin to tobacco litigation (which naysayers also called fanciful early on).[4] Global warming also is poised to become a global tort litigation issue (e.g., consider the Inuit people of Canada and Alaska and the Pacific Island nation of Tuvalu).[5]

In *Connecticut v. American Electric Power Co. (AEP)*, eight states and several other plaintiffs brought suit against five of the largest greenhouse gas emitters in the United States (fossil fuel-powered power plants) on a theory of nuisance.[6] The plaintiffs sought an order requiring defendants to reduce their carbon dioxide emissions, thereby abating their contribution to global warming. The case, which was filed in 2005, did not advance beyond the pleading stage in the district court, and appeal currently is pending before the Second Circuit. It is important to note, however, that the court granted the dismissal before the Supreme Court issued its decision in *Massachusetts v. EPA,* and before the relatively recent materialization of a much broader and seemingly undeniable scientific consensus that human activity is the main cause of global warming.[7]

In *Comer v. Nationwide Mutual Insurance*, private owners of property damaged in Hurricane Katrina filed an action in Mississippi against numerous insurance carriers, mortgage lenders, chemical companies, and oil companies.[8] Plaintiffs asked the court to certify four separate defendant classes, including a chemical company class and an oil company class, alleging that property damages they sustained during Hurricane Katrina were caused by defendants, actions that have contributed to global warming. The court permitted plaintiffs to proceed with the oil and chemical company defendants (instructing plaintiffs to file a separate suit against the other categories of defendants), stating:

> I foresee daunting evidentiary problems for anyone who undertakes to prove, by a preponderance of the evidence, the degree to which global warming is caused by the emission of greenhouse gasses; the degree to which the actions of any individual oil company, any individual chemical company, or the collective action of these corporations contribute, through the emission of greenhouse gasses, to global warming; and the extent to which the emission of greenhouse gasses by these

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> defendants, through the phenomenon of global warming, intensified or otherwise affected the weather system that produced Hurricane Katrina. This is a task that the plaintiffs are free to undertake if that is their intention…[9]

Although the court granted plaintiffs leave to file an amended complaint clarifying their claims, it dismissed the suit on August 30, 2007, setting out its rationale in just two short sentences: plaintiffs did not have standing, and plaintiffs' claims were non-justiciable pursuant to the political question doctrine. On September 17, 2007, plaintiffs filed a notice of intent to appeal to the Fifth Circuit.

In September 2006, the state of California filed a complaint in the Northern District of California against six of the nation's largest automakers, including General Motors and Ford. In *California v. General Motors Corp*., the state alleged in its complaint that the automakers, production of millions of automobiles "that collectively emit massive quantities of carbon dioxide in the United States" has earned them the distinction of being among the world's largest contributors to global warming.[10] The complaint alleges further:

> Right now, global warming is harming California, its environment, its economy, and the health and well-being of its citizens. Scientific debate is over: the massive atmospheric increase in carbon dioxide and other greenhouse gases resulting from human activity has changed the climate and will further change the climate over the next decades. Human-induced global warming has, among other things, reduced California's snow pack (a vital source of fresh water), caused an earlier melting of the snow pack, raised sea levels along California's coastline, increased ozone pollution in urban areas, increased the threat of wildfires, and cost the State millions of dollars in assessing those impacts and preparing for the inevitable increase in those impacts and for additional impacts.[11]

As a result, California asked that it be awarded billions of dollars in damages, and asked that the court enter a declaratory judgment that the defendants were jointly and severally liable to pay for additional damages incurred by California in the future for contributing to the ongoing nuisance of global warming.[12]

On September 18, 2007, in a shot across the bow of public nuisance lawsuits arising from greenhouse gas emissions, the Northern District of California entered an order granting the defendant automakers' motion to dismiss in *California v. General Motors Corp*.[13] In contrast to the Mississippi federal Court's decision in *Comer*, the California federal court issued a twenty-four page order. The primary basis for dismissal was that the complaint raised non-justiciable political questions that were beyond the limits of the Court's jurisdiction:

> This Court is mindful that the federal common law nuisance claim in *AEP* sought only equitable relief, whereas Plaintiff's current federal common law nuisance claim seeks damages. However, despite this difference, the Court finds that the same justiciability concerns predominate and significantly restrain this Court's ability to properly adjudicate the current claim. Regardless of the type of relief sought, the Court must still make an initial policy decision in deciding whether there has been an "unreasonable interference with a right common to the general public."… [T]he Court is left to make an initial decision as to what is unreasonable in the context of carbon dioxide emissions. Such an exercise would require the Court to create a quotient standard in order to quantify any potential damages that flow from Defendants, alleged act of contributing thirty percent of California's carbon dioxide emissions… [T]he adjudication of Plaintiff's claims would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development. The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court.[14]

In addition, the court stated that it did not have a manageable method of determining which entities created and contributed to the alleged nuisance, or standards by which to properly adjudicate the claims and measure damages.[15]

The Court's dismissal in *California v. General Motors Corp.* certainly is not the death knell to global warming litigation. In fact, the court expressly stated that the dismissal was without prejudice as to California's state law public nuisance claim. Moreover, California is sure to appeal the district Court's decision, and other enterprising mass tort plaintiffs' lawyers are unlikely to be daunted. In addition, none of these decisions is an indicator of how international courts will rule in cases brought by alien plaintiffs under the Alien Tort Claims Act against American automakers or power plants. Unlike the heating of the earth's atmosphere, two dismissals do not make a trend. Rather, the recent dismissals surely are mere bumps on the road of global warming litigation – litigation which is

only just beginning to simmer, as is the question of whether insurance coverage is available for such lawsuits.

II. GLOBAL WARMING COVERAGE ISSUES

Regardless of whether courts ultimately find that global warming tort suits have merit, so long as plaintiffs continue to file such suits and they remain pending, the targets of such litigation will have to defend them. CGL policies will be a valuable asset to corporate policyholders who find themselves a target in global warming lawsuits. The coverage issues likely will resemble those seen with other long-tail claims with which many coverage lawyers already are familiar, such as coverage trigger, scope of coverage and allocation among policies, the "as damages" requirement, and application of the pollution exclusion.

a. Legally Obligated to Pay as Damages

CGL policies provide coverage for those sums the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies (i.e., not otherwise excluded). Standard-form liability policies do not define the term "as damages." Thus, when coal and power companies are sued, and the settlement agreement includes an agreement by the corporate policyholder to refit its operations to reduce greenhouse gas emissions in the future, such damages arguably are covered. Specifically, an insured corporation will argue that the sums it will incur to reduce greenhouse gas emissions as set out in the settlement agreement constitute sums it is legally obligated to pay as damages. In contrast, insurers will argue that those costs are non-covered costs of doing business. In the traditional pollution context, policyholders have not made much mileage on this issue. But global warming is different.

In "traditional" environmental coverage litigation, the majority of courts have found that "damages" may include response costs, cleanup costs, and costs of remediation under CERCLA.

In "traditional" environmental coverage litigation, the majority of courts have found that "damages" may include response costs, cleanup costs, and costs of remediation under CERCLA because of potential or actual legal proceedings.[16] When it comes to costs incurred to reduce future emissions, policyholders have not fared as well. For example, in *Cinergy Corp. v. Associated Electric & Gas Insurance Services, Ltd.,* the Indiana Supreme Court recently considered whether costs a power company incurs to install equipment to reduce future emissions of pollutants in order to comply with federal regulations qualify as sums the insured is legally obligated to pay as damages.[17] The power companies were defendants in a lawsuit brought by the federal government, three state governments, and several environmental organizations under the Clean Air Act. Although the suit alleged that the discharge of excess emissions from the plants had resulted in widespread harm to public health and the environment, the suit did not ask that the power companies be directed to clean up or repair any environmental damage. Instead, the suit sought to enjoin the power companies from discharging excess pollution emissions in violation of the Clean Air Act and to compel the companies to install state-of-the-art technology to achieve the lowest possible emissions rate. In addition, the suit asked that the court assess a civil penalty for future violations of the Clean Air Act.

The court found that the power companies had failed to establish that their defense costs and expenses were incurred in the defense of a claim or suit seeking "damages" for bodily injury or property damage. The court drew a distinction between preventive measures taken as part of an environmental cleanup effort, which were covered, and preventive or prophylactic measures taken before environmental damage had occurred, which were not. Because the suit did not seek compensation for past environmental damage, the court found that the suit was "directed at preventing future public harm, not at obtaining control, mitigation, or compensation for past or existing environmentally hazardous emissions."[18] Stated differently, the primary thrust of the lawsuit was to require the insured to install government-mandated equipment intended to reduce future emissions of pollutants and prevent future environmental harm. In reaching its decision, the court applied the commonly-used distinction between remedial and prophylactic measures.

In the environmental context, the remedial versus prophylactic distinction tends to be a slippery one. While insurers often argue that insurance policies are not funding mechanisms for redesigning operations to comply with state and federal laws, where property damage has occurred and an element of those damages includes measures to prevent the recurrence or worsening of the damage, then the costs of those preventive measures are covered. This remedial versus prophylactic analysis will be an important issue in the context of global warming, i.e., whether the cost to an insured of complying with a "remediation" order constitutes damages the insured is legally obligated to pay.

Specifically, if reduction of emissions in the future is the only way to reduce the amount of greenhouse gases currently in the atmosphere, such reductions should constitute more than purely prophylactic costs, and thus should qualify as "damages." To illustrate, one commentator made the following analysis in the traditional environmental litigation context, which is equally (if not more) apt in the context of global warming:

> When one is dealing with water contamination or air contamination, for example, it may be that the remedy includes measures to reduce the concentrations of the deleterious substance released by the insured; by limiting additional releases of that substance, the water system, for example, is able to dilute the contaminants through ordinary recharges of the system and reduce the concentration below the level of "damage." In this way, stopping the on-going contribution of the deleterious substance can be thought of as a remedy for past damage (because this type of preventive remedy allows the damage to be mitigated). Were one to freeze-frame the issue, however, and look only at the remedy (and not the reason for the remedy), it might be argued that the measure is "prophylactic," that is, is meant to prevent the future release of contaminants. For purposes of analyzing the availability of insurance coverage, however, the question is why is the insured responsible for containing future releases. Where there already has been damage for existing releases of contaminants, "stop[ping] that ongoing release is not mere prophylaxis."[19]

Case law generally has held that "damages" under the CGL policy includes costs of preventive measures taken to prevent or halt continuing damages.[20] In contrast, "[p]reventive measures taken to prevent property damage from occurring at some point in the future, in the absence of past or current property damage, are the obligation of the insured as part of its cost of doing business…"[21] In the context of global warming then, where damage already has occurred due to existing releases of greenhouse gases, the cost to prevent future damage via preventative measures should qualify as damages under the CGL policy.[22]

As the global warming cases summarized above show, some of the lawsuits clearly seek damages arising from bodily injury or property damage, and thus would survive any coverage challenge on that basis.

For example, the plaintiffs in *Comer* clearly did seek property damage (damage to property sustained during Hurricane Katrina), and not just injunctive or prophylactic relief. In contrast, in *Connecticut v. American Electric Power Co. (AEP),* plaintiffs sought only injunctive relief. Other than in the context of pollution claims, courts generally have held that the costs of complying with an injunction are not sums the insured is obligated to pay as damages. Only one state court decision in Texas addresses whether an injunction can constitute "damages."[23] In *Feed Store, Inc. v. Reliance Insurance Co.*, the issue was whether an insurer was obligated to defend an insured against a trademark infringement suit which requested only prospective injunctive relief. The insurer had refused to defend on the ground that the CGL policy only obligated it to defend "any suit against the insured seeking damages," and the plaintiff in the underlying suit sought only injunctive relief. The Houston Fourteenth Court of Appeals found that the insurer did not have a duty to defend where the action sought injunctive relief and other relief which might "be required in equity and good conscience," but did not seek money damages.[24]

In the pollution context, a federal court sitting in Pennsylvania, applying Texas law, distinguished *Feed Store*.[25] The court stated that although *Feed Store* provided some guidance in predicting how the Texas Supreme Court would decide the issue, *Feed Store* did not consider whether the term "damages" was ambiguous. The court noted that *Feed Store* explicitly stated that the parties had agreed that the policy was unambiguous and, thus, the settled principle of Texas law requiring resolution of ambiguities in favor of the insured was quite immaterial to its decision.[26] The court also distinguished *Feed Store* because it was not considering "whether an insurance company is obligated to defend and indemnify an insured in an action seeking injunctive relief which requires the insured to expend significant amounts of money in order to comply, as is the case in most environmental litigation."[27] The court then reviewed the decisions of other jurisdictions to predict how the Texas Supreme Court would decide the issue, and concluded that an injunction pursuant to environmental laws is different from injunctions issued in other contexts. The court concluded that an insured's cost of complying with an injunction to remediate property damage or bodily injury under environmental laws is recoverable as "damages."[28] Assuming the suit seeks covered damages the insured is legally obligated to pay, the next issue is whether such damages were caused by an "occurrence."

b. "Occurrence Requirement"

CGL policies require that the damages be caused by an "occurrence" or accident. The question thus becomes whether the resulting damage from a corporate policyholder's green-

house gas emissions was the natural and expected result of the policyholder's actions, that is, was highly probable whether the policyholder was negligent or not.[29] In view of the massive scientific debate that only recently culminated in a consensus, it is unlikely that any evidence exists that corporate policyholders knew their carbon dioxide emissions would contribute to global warming and the resulting damage. Stranger things have happened, however. Consider, for example, the evidence that was uncovered during the tobacco litigation that big tobacco spent more than thirty years lying about what it knew to be true, namely that nicotine was addictive and that smoking causes lung cancer. In the high-stakes world of global warming litigation, both plaintiffs, lawyers and carriers are sure to search high and low for a similar smoking gun.[30] Once policyholders make it past the occurrence and covered damages requirements, another significant hurdle exists to trigger coverage for global warming litigation – the pollution exclusion.

c. Pollution Exclusion

Because greenhouse gas emissions that are stated to be the cause of global warming are thought to have begun at the of the dawn of the Industrial Revolution at the end of the 18th century, all policies issued from a corporate policyholder's inception through the time of the filing of the litigation potentially will be triggered. Importantly, before 1973, most CGL policies did not have pollution exclusions. Carriers added the pollution exclusion in the early 1970s, and it has taken several forms since: the standard or "sudden and accidental" pollution exclusion, several variations of the so-called absolute pollution exclusion, and several variations of the so-called total pollution exclusion. Thus, policies at issue in the global warming context likely will contain no pollution exclusion, the standard or "sudden and accidental" pollution exclusion, the so-called absolute pollution exclusion, and the so-called total pollution exclusion.

Whether the pollution exclusion will bar coverage first requires an analysis of whether greenhouse gases qualify as "pollutants" under the CGL policy. In *Massachusetts v. EPA,* the Court stated that greenhouse gas emissions qualify as pollutants under the Clean Air Act. This does not mean, however, that greenhouse gas emissions qualify as pollutants as defined in the CGL policy. In fact, the definitions of pollutant in the Clean Air Act and that in the CGL policy differ significantly. Each variation of the pollution exclusion in the CGL policy contains a similar definition of "pollutant" – "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The Clean Air Act, however, defines pollutant much more broadly as "any air pollution agent…, including any physical, chemical,… substance… emitted into… the ambient air…"[31] In addition, the analysis of whether a substance qualifies as a pollutant under the Clean Air Act such that the EPA must regulate the substance is an entirely different inquiry than whether a substance qualifies as a pollutant under the pollution exclusion such that a carrier may avoid coverage under its policy.

Because many greenhouse gases occur naturally (such as water vapor, carbon dioxide, methane, and nitrous oxide), policyholders have a reasonable argument that greenhouse gases do not qualify as a pollutant under the CGL policy's definition. At the very least, a strong argument exists that the pollution exclusion is ambiguous in the context of greenhouse gases; thus the policy should be interpreted in favor of coverage. In the unlikely event that insurers prevail on the argument that carbon dioxide emissions do qualify as pollutants under the CGL policy, the policyholder's best bet for securing a defense is under policies containing the absolute pollution exclusion (as well, of course, as those early policies containing no pollution exclusion).

In the late 1970s, insurance companies drafted the so-called absolute pollution exclusion purportedly to eliminate coverage for most pollution, including sudden and accidental pollution.

The earliest pollution exclusion, the standard or "sudden and accidental" pollution exclusion, barred coverage for: "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is *sudden and accidental*." Because global warming lawsuits allege greenhouse gas emissions occurred over decades, if not hundreds of years, carriers will rely on the standard pollution exclusion to deny coverage; particularly in those jurisdictions where courts have held that "sudden" means "abrupt."

In the late 1970s, insurance companies drafted the so-called absolute pollution exclusion purportedly to eliminate coverage for most pollution, including sudden and accidental pollution. The absolute pollution exclusion generally bars coverage for bodily injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal, release or

escape of pollutants" at or from premises owned or operated by the insured, and for "any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants." Because the terms "arising out of" and "pollutant" are so broad, insurers argue that most anything qualifies as arising out of the discharge, dispersal, release, or escape of a pollutant. Importantly, the exclusion does not bar coverage for damages arising out of products or completed operations nor to certain off-premises discharges of pollutants. Thus, if the global warming defendant is a car manufacturer or a producer of gasoline, and the suit alleges that the defendant auto manufacturer or petroleum company contributed to global warming via the sale of its vehicles or the sale of gasoline, such allegations would fall within the product exception to the absolute pollution exclusion.[32]

d. Trigger and Allocation

Because global warming did not occur overnight, but rather developed over decades much like traditional pollution claims, coverage trigger will be an important issue in global warming coverage disputes. In construing CGL policies, courts uniformly have held that coverage is "triggered" under a specific policy when "bodily injury" or "property damage" takes place. Because an insurer will only be liable for indemnification or defense costs under its policy if the injury or damage takes place during the term of the policy, the determination of the date of the injury or damage is very important. Depending upon the trigger of coverage theory a court adopts, a single policy or a number of policies may apply.

Determining which policy(ies) is triggered in long-tail claim cases (e.g., pollution, asbestos exposure cases, and now global warming) can be very difficult. For example, recently discovered global warming-related injuries or property damage are alleged to be the result of accumulation of greenhouse gasses in the earth's atmosphere over many years. In traditional pollution cases, the overwhelming majority of courts have adopted one of the multiple-policy triggering theories in long-tail claim cases. Global warming insurance coverage litigation should prove to be no different in this regard. Therefore, it is important that policyholders faced with a global warming suit provide notice to all of its CGL policy insurers from the inception of the corporation to the present.

Claims triggering potential coverage under multiple policies raise the issue of which of the triggered policies are obligated to pay defense costs or sums that the policyholder is legally obligated to pay. Policyholders generally contend that each insurer on the risk is jointly and severally liable for all defense costs or indemnity payments up to the policy limits. Under this approach, the policyholder selects the policy that will pay the costs. The insurer(s) selected to pay defense costs or indemnity payments may seek contribution from other insurers on the risk based on its subrogation rights or "other insurance" provisions in its policy.[33]

Insurers, on the other hand, often argue that defense and indemnity obligations should be allocated equitably among the policies and insurers on the risk. Additionally, insurers generally contend that a policyholder should be responsible for that portion of a loss attributable to any self-insured or uninsured period or any period for which a policy's limits have been exhausted or any period for which the policyholder is unable to prove up the existence of a policy.[34]

This brings up a final key issue that will give rise to what are sure to be hard-fought battles in global warming insurance coverage litigation – choice of law. Which state's law applies to the dispute will be key in resolving many of the coverage issues in this new and developing area.

III. CONCLUSION

It seems likely that policyholders (by virtue of the facts the tort plaintiffs' lawyers plead) will overcome the various hurdles to triggering a duty to defend for global warming litigation. Whether plaintiffs ultimately prevail in proving causation resulting in covered damages under CGL policies is another matter entirely. Only time will tell whether global warming will be the next tobacco or asbestos, or just another Y2K. But one thing is certain: until the flame of global warming litigation burns out, corporate policyholders who find themselves as defendants in such litigation will look to their CGL insurers to defend the suits – and they have a fairly good chance of prevailing against their insurers on the coverage issues.

1. 127 S. Ct. 1438 (2007).

2. *Id*. at 1441.

3. Id. at 1442–43.

4. Earlier this year, Steve Susman told the Dallas Morning News: "You're going to see some really serious exposure on the part of companies that are emitting CO_2. I can't say for sure it's going to be as big as the tobacco settlements, but then again it may even be bigger." E. Torbenson, *Lawyers Preparing for Explosion of Climate-Related Work,* Dallas Morning News (June 24, 2007), available at http://www.dallasnews.com/sharedcontent/dws/bus/stories/062507dnbusgreenlawyers.37f90e0.html.

5. *See, e.g.*, M. Allen & R. Lord, *The Blame Game: Who Will Pay for the Damaging Consequences of Climate Change,* 432 Nature 551 (Dec. 2004) ("[W]e could one day see California farmers suing member states of the

European Union for authorizing emissions that threatened the security of their water supplies."); R. Jacobs, Comment, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice,* 14 Pac. Rim L. & Pol'y J. 103 (2005) R. Reed, Comment, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 Pac. Rim L. & Pol'y J. 399 (2002).

Incidentally, Steve Susman is providing counsel to an Inuit tribe who has lost its home because of global warming.

6. *See Connecticut v. Am. Elec. Power Co.,* 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

7. In case you missed Al Gore's Oscar-winning documentary, *An Inconvenient Truth,* here's the short version: The combustion of fossil fuels and resulting emission of greenhouse gases are stated to be the main causes of increases in the ambient temperature of the earth's lower-level atmosphere, surface, and ocean waters. After the film was released, the Intergovernmental Panel on Climate Change (IPCC) issued a report in February 2007 setting out the panel's conclusion that it was *at least* 90% certain that human emissions of greenhouse gases, rather than natural variations, are warming the planet's surface. "The IPCC WGI concluded in Paris, on February 2nd this year, that 'warming of the climate system is unequivocal.' Global mean surface temperature has increased by 0.74°C (1.3°F) over the last 100 years, with temperatures over land rising much quicker than over oceans. The warming is widespread, with a maximum at higher northern latitudes. Most of the observed increase in temperature since 1950 is very likely (probability of occurrence: over 90%) due to the increasing GHG concentration due to human activities, mostly the burning of fossil fuels and deforestation." IPCC press release available at http://www.ipcc.ch/press/Jean-Pascal_van_Ypersele_may07.pdf. "Achim Steiner, executive director of the United Nations Environment Programme (Unep), said the findings marked a historical landmark in the debate about whether humans were affecting the state of the atmosphere. 'It is an unequivocal series of evidence [showing that] fossil fuel burning and land use change are affecting the climate on our planet.'" R. Black, *Humans Blamed for Climate Change,* BBC News (Feb. 2, 2007), available at http://news.bbc.co.uk/2/hi/science/nature/6321351.stm. *See also* New Scientist Environment, Special Report – Climate Change, available at http://environment.newscientist.com/channel/earth/climate-change/. Gore and the IPCC Panel on Climate Change won the 2007 Nobel Peace Prize.

Even ExxonMobile admitted earlier this year (after withdrawing a statement that it had made 20 minutes earlier claiming that it had been the victim of a smear campaign by the Union of Concerned Scientists) that: "It is clear today that greenhouse gas emissions are one of the factors that contribute to climate change, and that the use of fossil fuels is a major source of these emissions." J. Adler, *Oil: ExxonMobil's 'Greenwash' Campaign,* Newsweek web exclusive (Jan. 4, 2007), *available at* http://www.msnbc.msn.com/id/16475341/site/newsweek/.

8. *Comer v. Nationwide Mut. Ins.*, No. 1:05 CV 436 LTD RHW, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006).

9. *Id.* *4. For an interesting proposal regarding allocation of liability among global warming defendants, see Daniel J. Grim, *Global Warming and Market Share Liability: A Proposed Model for Allocating Tort Damages Among CO_2 Producers*, 32 Colum. J. Envtl. L. 209 (2007).

10. *California v. Gen. Motors Corp.*, No. 3:06CV05755 (N.D. Cal. filed Sept. 20, 2006), Complaint for Damages and Declaratory Judgment.

11. *Id.* at 1–2.

12. Recall that with tobacco litigation, state attorneys general recovered over $200 billion from big tobacco for amounts incurred under Medicaid plans for treating smoking-related diseases.

13. 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

14. *Id*. at *8. Interestingly, Judge Anthony Ishii, of the Eastern District of California, recently found on the issue of foreign policy preemption (whether the EPA's authority to regulate the emission of greenhouse gases was preempted by executive branch policy) that the current administration has no foreign "policy" with regard to greenhouse gas emissions:

> There is absolutely no reason in logic for any presumption that the efforts of California or any other state to reduce greenhouse gas emissions would interfere with efforts by the Executive Branch to negotiate agreements with other nations to do the same. Plaintiffs offer no evidentiary basis for the proposition that the United States would get farther in its efforts to negotiate agreements with other nations by withholding efforts to limit greenhouse gas emissions than by leading the way by example. In essence, Plaintiffs, "bargaining chip" theory of interference only makes logical sense if it would be a rational negotiating strategy to refuse to stop pouring poison into the well from which all must drink unless your bargaining partner agrees to do likewise. The court declines to make any presumptions to that effect…
>
> Based on all the evidence submitted…, the court finds no indication of any "policy" by the President or Secretary of State to differentiate efforts to decrease greenhouse gas emissions from automobiles from efforts to decrease greenhouse gas emissions from any other source. The court further finds absolutely no evidence of any "policy" on the part of the Administration to restrain state-based activities to curb greenhouse gas emission in order to leverage international cooperation. The court concludes Plaintiffs' foreign policy preemption claim must fail because the evidence submitted does not identify any "policy" with which California's… Regulations might conflict.

Central Valley Chrysler-Jeep, Inc. v. Goldstone, 2007 WL 4372878, *37 (E.D. Cal. Dec. 11, 2007).

15. *Id*. at *15.

16. *See, e.g., Int'l Ins. Co. v. RSR Corp.,* 426 F.3d 281, 287–88 (5th Cir. 2005) (Texas law).

17. 865 N.E.2d 561 (Ind. 2007).

18. *Id*. at 532–33. *See also Newnam Mfg., Inc. v. Transcontinental Ins. Co.,* 871 N.E.2d 396, 404 (Ind. Ct. App. 2007) (relying on *Cinergy*, stating: "The federal lawsuit is directed at preventing future public harm, not at obtaining control, mitigation, or compensation for past or existing environmentally hazardous emissions.").

19. Mark Mayerson, *On Suits and Prophylactics: Recurring Environmental Coverage Issues* (May 22, 2007), http://www.insurancescrawl.com/archives/defense/ (quoting *Watts Indus. v. Zurich Am. Ins. Co.,* 121 Cal. App. 4th 1029 (2004)). *See also A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.,* 475 N.W.2d 607, 612 (Iowa 1991) ("Air and navigable waters are, generally speaking, self-cleansing through time. Carbon monoxide in air and phosphates in water can thus be abated by limiting or eliminating present sources of pollution.") (quoting *U.S. v. Shell Oil Co.*, 605 F. Supp. 1064, 1070 (D.C. Colo. 1985)).

20. *See, e.g., Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1193–94 (9th Cir.1986) (applying Oregon law) (finding state supreme court would hold that discharging pollution into water causes damage to tangible property; consequently, cleanup costs are recoverable under a property damage liability clause); *U.S. Fid. & Guar. Co. v. Thomas Solvent Co.,* 683 F. Supp. 1139, 1168 (W.D. Mich. 1988) (holding that response or cleanup costs "are essentially compensatory damages for injury to [government] property"); *A.Y. McDonald*, 475 N.W.2d at 623 ("[T]he damages to natural resources is simply measured in the cost to restore them to their original state."); *Ohio v. U.S. Dep't of Interior,* 880 F.2d 432, 441–45, 459 (D.C. Cir. 1989) (holding that cost of restoration is the proper measure of "damages" under CERCLA, even if greater than the diminution in value of the damaged property).

21. Chesler, Rodburg & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability,* 18 Rutgers L.J. 9, 67 (1986–87).

22. As aptly stated by the Iowa Supreme Court over fifteen years ago: "[T]he government's interest in protecting its natural resources is a form of property right. We hold that any injury to the environment resulting from contamination by hazardous waste constitutes 'property damage' within the meaning of the CGL policies. We further hold that any injury to the environment resulting from contamination is incurred 'because of property damage' and represents the measure of damages to the property. This is true whether such costs are incurred on property owned by the insured, the state or federal government, or third parties." *A.Y. McDonald,* 475 N.W.2d at 624.

23. *Feed Store, Inc. v. Reliance Ins. Co.,* 774 S.W.2d 73 (Tex. App. – Houston [14th Dist.] 1989, writ denied).

24. *Id*. at 74–75.

25. *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Lit.,* 870 F. Supp. 1293, 1335–39 (E.D. Pa. 1992), *aff'd on other grounds,* 15 F.3d 1249 (3d Cir.), *cert. denied sub nom,* 115 S. Ct. 291 (1994).

26. *Feed Store*, 774 S.W.2d at 75.

27. *Texas Eastern,* 870 F. Supp. at 1331.

28. *Id*. at 1333. *See also A.Y. McDonald,* 475 N.W.2d at 616 ("A more troublesome question concerns costs incurred in compliance with environmental injunctions. But even here, most state appellate courts have held that these costs are likewise covered. Some of these courts view such costs as fitting the ordinary meaning of 'damages.'").

29. *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.,* 2007 WL 2459193, *4 (Tex. Aug. 31, 2007).

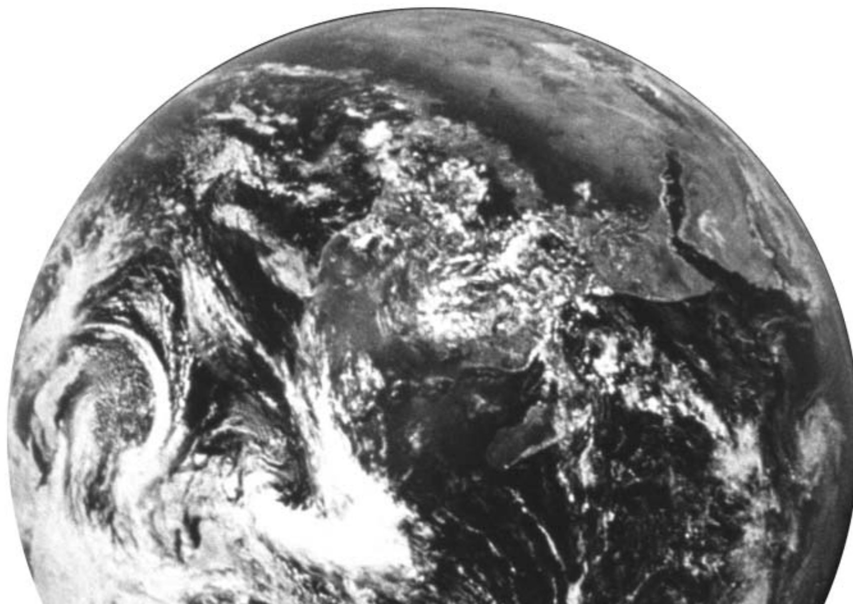
30. David Bookbinder, senior attorney in the environmental litigation section of the Sierra Club opined: "Ultimately, I have a hunch that the auto industry's liability for those products will turn – in much the same way as the tobacco cases – as Detroit's superior knowledge of those impacts and its public misinformation campaign denying what it long ago knew to be the truth about global warming. As they say inside here in D.C., it's not the mistake that will get you, it's the cover-up." *Global Warming on Trial,* Wall Street J. (Nov. 20, 2006), available at http://online.wsj.com/article/SB116369649252825205.html. *See also* J. Adler, *Oil: ExxonMobil's 'Greenwash' Campaign,* Newsweek web exclusive (Jan. 4, 2007), *available at* http://www.msnbc.msn.com/id/16475341/site/newsweek/.

31. 42 U.S.C.A. § 7602(g). *See also Massachusetts,* 127 S. Ct. at 1462 ("While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence… Because greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.") (emphasis added).

32. Because carbon dioxide emissions from the transportation sector are said to be the largest source of energy-related carbon dioxide emissions, and almost all (98 percent) of transportation sector carbon dioxide emissions result from the consumption of petroleum products, the products exception to the absolute pollution exclusion will be a coverage boon to auto manufacturers and petroleum manufacturers.

33. *See Am. Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842, 854–55 (Tex. 1994); *Tex. Prop. & Cas. Ins. Guar. Ass'n v. Sw. Aggregates, Inc.,* 982 S.W.2d 600, 605 (Tex. App. – Austin 1998, no pet.).

34. *See, e.g., Montrose Chem. Corp. v. Admiral Ins. Co.,* 913 P.2d 878, (Cal. 1995) (holding that where multiple insurers are on the risk, costs are to be allocated in proportion to their respective policies, limits or the time periods covered under each such policy).



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BY PHILLIP K. MAXWELL AND JOE K. LONGLEY

LONGLEY & MAXWELL, LLP

History of Article 21.21 and Deceptive Trade Practices Act

I. GENERAL CONSIDERATIONS

A. Importance of History

Justice Cardozo said, "History, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future."[1] In a practice manual, however, the point is best made in practical terms. History is important because it can decide the outcome of a case.[2] Under accepted rules of statutory construction, the meaning of a statute, if not apparent from its words, can only be determined by carefully evaluating the circumstances of its passage. Thus, a working knowledge of the origins of Article 21.21, what it sought to achieve, and why it was invested with a private remedy in 1973 – when an almost identical provision became law that year as part of the Deceptive Trade Practices Act – ought to inform consideration of any question to arise under these two related statutes. Unfortunately, often this has not been the case. Courts – and the advocates who appear before them – have been quick to say that the legislature "intended" this or "did not intend" that, but rarely have these conclusions been backed with citation to the legislative record. Historical analysis is also missing from law commentary on these two statutes. Much of what has been written or said about 21.21 and the DTPA has centered on the latest headline-grabbing case or legislative amendment, ignoring the reasons why these statutes were passed in the first place. What follows is an effort to fill this gap in scholarship. It is an account of how Article 21.21 and the DTPA, among the strongest consumer protection measures in the nation when they passed, became law. It is a light cast on the past of these important enactments in order that their present and future might be better illuminated.

II. REGULATION OF DECEPTIVE AND UNFAIR TRADE PRACTICES BEFORE 1973

A. History of Article 21.21 of the Insurance Code

Statutory remedies are so much a part of Texas insurance law today that it is difficult to imagine a time when they were not. But before 1973, except for a provision allowing the holder of a life, health or accident policy to recover a twelve percent penalty and attorneys, fees from a company failing to pay a life, health or accident policy claim within thirty days of demand,[3] persons injured by abusive insurance practices were left to common law actions for fraud and breach of contract. No statutory relief was afforded persons denied prompt payment under their homeowners, automobile or business interruption policies or those persons damaged by the unfair and deceptive practices prohibited by Article 21.21, the Insurance Code's most important consumer protection provision. Similarly, no remedy was extended to persons injured by statutorily prohibited unfair or deceptive practices in the purchase, lease or use of goods and services generally, so they too were limited to whatever remedies the common law allowed.

Though 1973 was the year that private citizens were handed the tools to protect themselves from sharp and unfair market practices in Texas, the tools themselves were forged years earlier. Both Article 21.21 and the Deceptive Trade Practices Act are related to the Federal Trade Commission Act, but they came to Texas over different paths, nurtured by different political considerations. For Article 21.21, the road starts in the 1940's with a United States Supreme Court decision that reversed a hundred years of federal deference to state regulation, a ruling that forced the states to better protect their own citizens.

Mr. Longley was the principal drafter of H.B. 417 which was the vehicle used by the Legislature to enact these measures in 1973. Through the ensuing years, he and Mr. Maxwell have been highly active in crafting and implementing the consumer remedies provided to Texas citizens by both serving as Chief of the Texas Attorney General's Consumer Protection Division and further by both serving as Chair of the State Bar's Consumer Law Section. For 25 years their law firm has been instrumental in the judicial development of this area of the law. Because of their pioneering efforts in Texas consumer law, Texas Lawyer honored them in 2000 by naming them both to its exclusive list of 100 Legal Legends. In 2003, Mr. Longley was further singled out by the Texas Lawyer as being its selection as the "Go-To-Lawyer" in the field of Insurance Law. Mr. Maxwell and Mr. Longley have authored two books and have written numerous CLE and law review articles on consumer and insurance law. Since 2001, they both have taught insurance law as Adjunct Professors at the University of Texas School of Law.

Editor's Note: The Texas Legislature recently renumbered the Texas Insurance Code and changed Article 21.21 to Article 541. It will take many years for courts and lawyers to stop using "21.21" so the historic reference is both understandable and appropriate.

In 1944, the United States Supreme Court held in *United States v. South-Eastern Underwriters Ass'n*[4] that insurance companies operating across state lines were in interstate commerce and thus subject to the federal antitrust laws. The decision sent shock waves through the insurance community. To state insurance officials the decision made comprehensive federal taxation and trade regulation of insurance inevitable, draining state coffers of revenue and terminating the need for their services.[5] The ruling unnerved the insurance industry as well. Though seventy-five years earlier it had urged the Commerce Clause as a basis for the Supreme Court to strip the states of power to regulate insurance,[6] "[i]ronically, by 1944, the insurance industry preferred the generally lax regulation of the state authorities."[7] The specter of federal antitrust actions aimed at its cooperative rate setting and policy-writing activities caused the insurance industry to rally around legislation proposed by the National Association of Insurance Commissioners.[8] The legislation, known as the McCarran-Ferguson Act, passed in 1945.[9]

The McCarran-Ferguson Act, while forbidding any construction of federal law that would invalidate, supersede or impair state insurance regulations, expressly subjected the business of insurance to the Sherman and Clayton antitrust acts and the Federal Trade Commission Act "to the extent that such business is not regulated by State law."[10] Thus the act created a "reverse preemption," displacing federal law only if the state in which the conduct occurred regulated anti-competitive, unfair and deceptive trade practices in the insurance business.

To be sure, the states were regulating insurance, but none had a regulatory arsenal aimed at anti-competitive, unfair and deceptive conduct anywhere approaching the strength and scope of the Sherman, Clayton, and Federal Trade Commission acts. To give the states time to fill the regulatory gap, Congress exempted the business of insurance from these federal statutes for three years.[11] During the floor debate, Senator McCarran made plain what the states had to do in this period in order to avoid federal regulation.

> Mr. MURCOCK. As I understand the conference report which is now before the Senate, it provides for a 3-year moratorium, which is fixed as ending January 1, 1948, against the invoking of the Sherman Act and the Clayton Act, and it provides that they shall again be in force after that period without any affirmative action on the part of the Congress, except as regulatory matters have been enacted by the States relating to the subjects covered by those acts–
>
> Mr. McCARRAN. During the moratorium. Regulatory acts must be enacted by the several States in each of the several States. Otherwise the antitrust acts become effective after January 1, 1948.
>
> Mr. MURDOCK. But is it not the purpose of this bill and does not the bill accomplish this–
>
> Mr. McCARRAN. It accomplishes a moratorium for 3 years against the operation of the acts mentioned, namely, the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, as amended, and the Robinson-Patman Antidiscrimination Act.
>
> Mr. MURDOCK. So that during the moratorium it is intended, is it not, that the states shall affirmatively step into the regulation of the insurance business?
>
> Mr. McCARRAN. That is correct.
>
> Mr. MURDOCK. And it is intended that on the expiration of the moratorium the Sherman Act, the Clayton Act, and the other acts mentioned will again be come effective except–
>
> Mr. McCARRAN. Except as the States themselves have provided regulations.[12]
>
> * * *
>
> Mr. BARKLEY. I should like to ask, in this connection, whether, where States attempt to occupy the field – but do it inadequately – by going through the form of legislation so as to deprive the Clayton Act, the Sherman Act, and the other acts of their jurisdiction, it is the Senator's interpretation of the conference report that in a case of that kind, where the legislature fails adequately even to deal with the field it attempts to cover, these acts still would apply?
>
> Mr. McCARRAN. That is my interpretation.[13]

Realizing, as did Congress, that state regulatory schemes were deficient, the National Association of Insurance Commissioners began work almost immediately on a model unfair competition and deceptive practices act for adoption by the states. This effort culminated in 1947 with the NAIC's adoption of "An Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance."[14] Lifting language directly from section 5 of the Federal Trade Commission Act, the NAIC model law prohibited any "unfair

method of competition" and any "unfair or deceptive act or practice" in the business of insurance.[15] The model law listed certain activities that it "hereby defined" to be such methods, acts or practices[16] and provided for regulatory oversight by the state insurance commission.[17]

Texas, however, did not adopt the model act for ten years. Why is unclear, though it seems safe to conclude that the insurance industry did not particularly like the model act's broad condemnation of unfair and deceptive practices and the strengthened hand it gave state regulators. And despite Congressional opinion that existing state laws were inadequate and that the three-year moratorium was to be used to beef them up,[18] the insurance industry and state officials were apparently unconvinced that incorporating the model act into Texas law was needed to avoid federal regulation. Had it been otherwise, there is little doubt the model act would have been passed as handily in 1947 as it did ten years later. Who would have opposed it? Whatever fledgling consumer interests there were in Texas in 1947 certainly would not have challenged legislation to rid the insurance industry of unfair or deceptive practices.

Instead of passing the NAIC model law, Texas reacted to the McCarran-Ferguson Act by codifying its existing insurance statutes. From the emergency clause of the 1951 bill that created the Insurance Code, it is clear that Texas was not ready to admit that its insurance laws needed shoring up or that failing to do so risked federal regulation of the insurance industry in the state.

> [J]urisdictional uncertainties arising from the United States Supreme Courts' [*sic*] decision holding that the business of insurance transacted across state lines is interstate commerce within the meaning of the Federal Constitution, ma[ke] it practicable and necessary that [the present laws relating to insurance] shall be made clear, concise, adequate and consistent for the protection of the insuring public as well as for the protection of those engaged in the business of insurance…[19]

In reality, there were no "jurisdictional uncertainties" in 1951. The United States Supreme Court had clearly held that the business of insurance was subject to federal jurisdiction and Congress had accepted this premise in passing the McCarran-Ferguson Act to provide the states a way out.[20] The only "uncertainty" was whether Texas, insurance laws would pass muster under McCarran-Ferguson. The insurance industry and the Department of Insurance apparently felt that if all these laws were nicely bound together in a code, at least there would be the appearance if not reality of comprehensive insurance regulation and that alone might be enough.

Essentially, all that codification involved was taking the insurance statutes that were already on the books, organizing them according to the topic they addressed, and then assigning them an "article" number. Thus there was an "Article 21.21" included in the Insurance Code enacted in 1951, but it bore little resemblance to today's text. Then modestly entitled "Discrimination," Article 21.21 simply duplicated the provisions of a 1909 statute[21] that prohibited five, narrowly described practices dealing with rebating and discrimination.[22] Any company, officer or agent violating these provisions was guilty of a misdemeanor and subject to a maximum fine of five hundred dollars. In addition, the offending company could forfeit its certificate of authority to do business and the violating agent could lose his license for a year.[23]

What finally moved Texas to pass the NAIC model law in 1957 was an extensive Federal Trade Commission investigation of the advertising practices of the health and accident insurance industry in 1953 and 1954 culminating in two major enforcement actions decided in 1956.[24] In April of that year, the Commission issued a cease and desist order against The American Hospital and Life Insurance Company[25] located in San Antonio and a month later issued another against a Michigan insurer, National Casualty Company.[26] In each case, the Commission found that brochures the companies had mailed to out-of-state agents for delivery to prospective policyholders were false, misleading and deceptive in violation of section 5 of the Federal Trade Commission Act.[27] More importantly, the Commission ruled in both cases that the McCarran-Ferguson Act did not bar federal action, even in those states with statutes regulating the insurance industry.[28] Suddenly, federal regulation of Texas insurance trade practices had gone from theoretical threat to cold, hard fact. Though the Commission would later be reversed by the Fifth[29] and Sixth[30] Circuits in 1957, cases in which Texas appeared in support of the insurance companies, by that time the legislature, prodded by an insurance industry and state insurance department desperate to ward off federal regulation, had passed the model act.

At first, it seemed that the insurance industry and state regulators might fare well before the Commission. The hearing examiners in both *American Hospital* and *National Casualty* ruled that, under the McCarran-Ferguson Act, the Commission had no jurisdiction in those states that regulated insurance by statute. Ironically, though *American Hospital* involved a Texas insurer, the adequacy of Texas' regulatory scheme was not at issue in that case because the jurisdiction of the Commission, in its words, "has not been asserted over respondent's business transacted wholly within that State."[31] Texas law, as well as that of every other state, was at issue in *National Casualty*, however, because the Michigan insurer in that case was licensed to do business everywhere in the country. The hearing examiner found that the Commission's

jurisdiction over National Casualty Company was limited to Mississippi, Rhode Island, Missouri, Montana and the District of Columbia, which had no state statute, and that "each of the states other than those named fully regulates the business of insurance by legislative enactment, with the result that as to transactions within such states the Commission's jurisdiction is withdrawn."[32]

As it pertained to Texas, the hearing examiner's ruling in *National Casualty* is hard to justify. Texas had not yet adopted the NAIC model act and the only law that even arguably applied was Article 21.20,[33] but it prohibited, as it does today, only life insurance companies from misrepresenting the terms of their policies and National Casualty was a not a life insurance company.[34]

Whether the *National Casualty* hearing examiner analyzed the laws of the other states as inadequately as he did those of Texas is not known. Examiners' decisions are unpublished and in neither its *National Casualty* nor *American Hospital* opinions did the Commission pay any attention to the adequacy of the state statutes themselves or to the criteria the hearing examiners had used in reviewing them. Instead, the Commission concluded that it had jurisdiction regardless of state regulation because, in its view, the McCarran-Ferguson Act preserved the Commission's power where there were "interstate aspects" of the insurance business at issue such as the distribution of deceptive sales materials across state lines.[35] Because the Commission took the same position on appeal,[36] the opinions of the Fifth and Sixth Circuits likewise shed no light on the hearing examiners, conclusions regarding state law.

Mirroring the model act, Article 21.21 was divided into sections, the format it retains today.

Although the hearing examiner in *National Casualty* was wrong about Texas law, the state's subsequent adoption of the NAIC model act made the error harmless. By the time the Supreme Court granted review of *National Casualty* and *American Hospital* on November 12, 1957,[37] the model act had been on Texas law books in the form of a new and improved Article 21.21 for over six months. And by the time the Court handed down its decision on June 30, 1958 affirming the Fifth and Sixth Circuits,[38] the model act had been Texas law for over a year.[39] Thus, the Supreme Court could say accurately in 1958 what the hearing examiner three years earlier should not have: Texas "…has enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision."[40]

Though the Federal Trade Commission had lost a legal battle over its jurisdiction, it had won a political war of greater consequence. By flexing its national muscle, the Commission had forced the insurance industry and state lawmakers to give citizens strong state laws against unfair and deceptive insurance practices, protection they likely would have never received otherwise.

That avoiding federal regulation was a prime reason for Texas' 1957 adoption of the model act is made plain by the emergency clause of the legislation that enacted it:

> The …enactment of this Act will strengthen state regulation of the business of insurance… substantially the same Act has previously been enacted in thirty-nine states, and . . . it is designed to prevent federal regulation and taxation of the business of insurance…[41]

Mirroring the model act, Article 21.21 was divided into sections, the format it retains today. Section 1 set forth the purpose of the statute to regulate insurance trade practices in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act by providing for the determination and prohibition of all "unfair methods of competition or unfair or deceptive acts or practices."[42] Section 2 supplied two definitions, one for "person," a term that would assume added importance when the legislature gave a private treble damage remedy to "any person" in 1973,[43] and one for "Board," defined to mean the Board of Insurance Commissioners.[44] Section 3 declared that "no person shall engage" in unfair trade practices defined by, or determined under, the statute,[45] while section 4 "hereby defined" eight such practices,[46] including broadly worded provisions prohibiting misrepresentation of policies[47] and dissemination of false information respecting the insurance business.[48] In the remaining sections, the Board of Insurance Commissioners was given the power to investigate and determine whether prohibited practices had occurred,[49] to issue cease and desist orders,[50] and to sue for a civil penalty of fifty dollars if a cease and desist order was violated.[51] Following the model act which itself lacked such provisions, the 1957 amendments to Article 21.21 did not give the Board the power to issue regulations further defining unfair practices or to sue for an injunction, nor did it accord private persons injured by violations a statutory remedy.

In 1969, Article 21.21 was amended to give the Board power to issue rules and regulations.[52] Two years later, in

1971, the Board handed down the broadest regulation outlawing unfair and deceptive insurance practices it has ever issued, Board Order 18663.[53] The Board made clear in the order that it "appl[ied] to all types of insurance[,]"[54] that its provisions governed "insurers and insurance agents and other persons in their conduct of the business of insurance or in connection therewith," whether done "directly or indirectly" and "irrespective" of the "capacity" in which the person was acting,[55] and that the words used in the order were "not limited to the common law meaning" but rather were "to be interpreted to accomplish the purpose" of the order.[56]

If Board Order 18663 was inclusive as to whom it regulated, it was universal as to what it prohibited. The order did not simply repeat the broad condemnation of unfair practices in section 3 of Article 21.21, though it did that too. It went further to outlaw, not only unfair practices "as defined by the provisions of the Insurance Code of Texas or as defined by these and other Rules and Regulations of the State Board of Insurance authorized by the Code[,]"[57] but also any "improper trade practice" that, though not defined as unfair in any of the rules and regulations, had been determined to be so "pursuant by law."[58] Thus was swept into Board Order 18663 all unfair practices in the business of insurance, whether found in any of the provisions of the Insurance Code, any of the Board's regulations, or in the common law.

The breadth of Board Order 18663, like that of Article 21.21's definition of "person," would take on added significance when, during the 1973 legislative session, the legislature amended Article 21.21 to make a violation of the Board's regulations the grounds for a damage claim by "any person" while also enacting, almost simultaneously, a new Article 21.21-2 prohibiting "unfair claim settlement practices."[59]

B. History of the Deceptive Trade Practices Act

Just like the pre-1973 version of Article 21.21, the pre-1973 deceptive trade practice statute, Article 5069-10, also lacked a private remedy. Passed in 1967 as chapter 10 of the Consumer Credit Code,[60] the statute outlawed thirteen "deceptive practices" and authorized the Consumer Credit Commissioner to request the attorney general to seek an injunction against a violator.[61] If the defendant violated the injunction, the attorney general could "petition for recovery" of civil penalties of "not more than" one thousand dollars per violation of the injunction.[62] Since no civil penalties could be assessed for the initial violation of the statute, however, Article 5069-10 permitted violators to take at least one bite of the consumer's apple without risking a dime. To its weak enforcement mechanisms Article 5069-10 added a broad exemption provision immunizing any "actions or transactions permitted under laws administered by a public official acting under statutory authority of this State or the United States."[63] And despite the fact that other provisions of the Consumer Credit Code gave consumers the right to sue individually for statutory penalties if they were charged more than the maximum allowable rates of interest,[64] it gave them no remedy if they were harmed by unlawful deceptive practices.

Article 5069-10 was strengthened in 1969, but still had no private remedy.[65] A general prohibition of all "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade and commerce" was added to the thirteen specifically prohibited practices, and Texas courts were directed to Federal Trade Commission and federal court interpretations of section 5 (a)(1) of the Federal Trade Commission Act for guidance in construing the general prohibition.[66] In addition, the Consumer Credit Commissioner was given pre-litigation investigative powers and the authority to accept an "assurance of voluntary compliance" without filing suit, and penalties were increased from one to ten thousand dollars for each violation of an injunction.[67]

What seemed like a step toward stronger enforcement was more than offset, however, by the addition of three more exemptions to the already broad exclusion provided in 1967. Now immunized from prosecution were the insurance industry; advertising media, absent a showing that the intent or purpose of the advertiser was known by the advertising medium's owner or personnel; and any conduct that was subject to and compliant with the regulations and statutes administered by the FTC.[68]

And not only did the 1969 legislation fail to extend a private remedy to those victimized by deceptive practices, it expressly provided that "[n]othing in this Chapter either enlarges or diminishes the rights of parties in private litigation[,]"[69] thus cutting off any argument for an implied right of action.

C. Passage of H.B. 417 in 1973

1. Overview of H.B. 417

On May 21, 1973, the legal landscape changed dramatically when the Governor signed into law H.B. 417,[70] perhaps the most sweeping, state consumer protection measure ever enacted. The bill repealed Article 5069-10, creating in its stead the Texas Deceptive Trade Practices-Consumer Protection Act ("the DTPA") as new chapter 17 of the Business & Commerce Code,[71] and it amended Article 21.21 of the Texas Insurance Code.[72]

H.B. 417 kept the substantive prohibitions of Article 5069-10, added to them, vastly strengthened the mechanisms by which they would be enforced, and sharply reduced the persons and conduct that were exempt. To the broad prohibition

against false, misleading or deceptive acts or practices and the "laundry list" of thirteen specific deceptive trade practices that were in Article 5069-10, the bill added seven new items of prohibited conduct.[73] The broad statutory exemption that had immunized the insurance industry among others was replaced with a much narrower provision that essentially made all businesses except the media subject to suit.[74] To the Texas Attorney General, the chief law enforcement officer of the state, the statute gave the power to seek civil penalties and restitution for persons injured by deceptive trade practices without awaiting – with one notable exception discussed below – a request from another state official or agency.[75] To supplement public enforcement by the Attorney General's office, H.B. 417 granted to those adversely affected by deceptive trade practices, breaches of warranty, unconscionable conduct and violations of Article 21.21 of the Insurance Code and its regulations the right to sue the wrongdoer directly for treble damages and attorneys' fees.[76]

2. Factors Favoring Passage

From the mid-1960s through much of the 1970s, there was considerable public support for strengthening laws to protect consumers. Just why this was so has thus far escaped the serious attention of historians and is beyond the scope of this book.[77] Whatever may have been the root causes of the consumer movement in the 1960s and 1970s, Congress clearly felt its pressure. Among Congress, consumer initiatives during this period were creation of the Consumer Product Safety Commission[78] to protect the public from dangerous consumer products; passage of the Magnuson-Moss Warranty Act[79] to limit manufacturers disclaimers of warranties on consumer goods; and enactment of the Truth in Lending Act[80] to require lenders to inform consumers of the cost of debt they were assuming in increasing amounts. Summing up the activity at the federal level in her appearance before the Federal Trade Commission's National Consumer Protection Hearings in 1968, Betty Furness, Special Assistant to the President for Consumer Affairs, stated that:

> Never has a Congress introduced – and passed – so many consumer bills. Never have the departments and agencies of the Federal Government been more consumer conscious in their programs.
>
> Never has there been such interest in increased consumer representation and protection at State and local government levels. And never has there been such real progress in effective consumer education. And never have there been so many important studies by the Congress and by the executive brand which have brought consumer problems into clear focus.[81]

So popular had consumer protection become by the 1970's that a Republican president, Richard Nixon, was motivated to establish by executive order the Office of Consumer Affairs in the Executive Office of the President[82] to be run by his special assistant for consumer affairs, Virginia Knauer, a respected consumer advocate.[83]

Action at the federal level was matched, if not surpassed, by the states. By 1972, thirty-six states, including Texas, had passed a "little FTC act" prohibiting unfair or deceptive trade practices, though only twelve (Texas not included) expressly allowed a private remedy.[84] By 1981, every state, the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands had such statutes and all but eight of these fifty-four jurisdictions provided a private remedy.[85]

Consumer protection's national popularity in 1973, however, is insufficient to explain why the Texas legislature passed the Deceptive Trade Practices Act and amended Article 21.21 to allow private suits for treble damages.[86] This required loosening the business lobby's grip on state lawmakers, and that, in turn, took the "Sharpstown scandal" and the political housecleaning in Austin that followed.[87]

The scandal erupted over claims that a developer-banker attempted to purchase legislation that would have, via a loophole in federal law, exempted his bank from federal oversight. That moneyed interests may have greased public palms for private gain enraged Texas voters, causing them to elect a new governor, lieutenant governor, attorney general and a new majority in the senate and house (which in turn elected a new speaker), all of whom championed "open government" free of the secret influence of special interests and the lobbyists who serve them.

The Democratic nominee for attorney general, John Hill, then a respected plaintiff's lawyer and former Texas Secretary of State whose campaign promised improvement of the state's consumer protection laws, beat the business lobby supported incumbent in the spring primary. Unopposed in the fall general election, Hill was able to campaign for House and Senate candidates in contested races, which helped seal their support for his legislative program. Thus, by the time the legislature convened in 1973, it was clear that a bill increasing the consumer protection powers of the attorney general and giving consumers the right to sue was going to pass.

Because it knew that a bill was going to pass anyway and because it wanted to "catch the late train" with the new attorney general whose consumer protection division would soon be monitoring its members, advertising and sales practices, the Texas Retailers Association supported Hill's legislation. Other business interests, unable to kill the legislation altogether, were

forced to limit their opposition to features of the bill they deemed most objectionable while publicly applauding the goal of protecting consumers. This was the position in which the insurance industry found itself as the gavel rang in the opening of the 1973 legislative session.

Without political upheaval caused by scandal, without a consequently weakened and divided business lobby, there is no assurance that Hill's legislation would have ever seen the light of day. Even with these political fortunes in its favor, H.B. 417 (and its companion bill in the Senate, S.B. 75) consumed over twenty hours of committee hearings during the 1973 legislative session, a record surpassed only by the appropriations bill. In these hearings and on the floor of both houses, H.B. 417 received intense scrutiny and lively debate. What emerged from this legislative crucible was arguably the strongest, and certainly one of the most thoroughly considered, consumer protection laws in the nation.

3. Insurance Industry Compromise on H.B. 417

H.B. 417 passed with two private remedy provisions for violations of Article 21.21 of the Insurance Code. One became the fourth cause of action in section 17.50(a) of the Business and Commerce Code available to any "consumer" (a term defined in the bill). The other was inserted into Article 21.21 as a new section 16, giving a cause of action to any "person" (a term already defined in Article 21.21). But H.B. 417 (and the Senate version, S.B. 75) did not start with any cause of action for Article 21.21 violations, let alone two.[88] Indeed, H.B. 417 as originally filed did not mention the word insurance. The fourth cause of action in section 17.50 in the original version of H.B. 417 was for violations of the Consumer Credit Code, not Article 21.21 of the Insurance Code.[89] The Article 21.21 cause of action in section 17.50 and the separate cause of action in Article 21.21 itself resulted from a legislative compromise between the insurance lobby, which opposed H.B. 417, and the newly elected Texas Attorney General, John Hill, who was pushing for its passage.

What emerged from this legislative crucible was arguably the strongest, and most thoroughly considered, consumer protection law in the nation.

The insurance industry objected to H.B. 417 in its original form mainly because it gave the Attorney General the power to issue deceptive trade practice regulations,[90] a power already vested in the insurance department, without providing an exemption for the insurance industry as did Article 5069-10, the deceptive trade practice law that H.B. 417 was repealing. Establishing what it called "dual regulation" was unwise, the insurance lobby contended, because the industry would be required to serve two masters having two, potentially conflicting, sets of regulations.[91] The insurance lobby argued further that existing insurance law was ample to protect the public from unfair and deceptive practices,[92] but, if the legislature felt new remedies were needed, they should be put in the insurance department, not the office of attorney general. As one insurance lobbyist put it:

> …if there is a weakness in the current law, and a need for new remedies, well then change the law, but put the regulatory authority in the hands of the people who have the expertise and who have the staff and who are exercis[ing] the jurisdiction today, and not in a new agency…[93]

While criticizing the bill publicly, the insurance lobby privately sought compromise. The insurance lobbyists proposed that, if the attorney general's office would drop the provision granting it rulemaking power and agree to a requirement that suit by the attorney general against a licensed insurer or agent be instituted only at the request of the State Board of Insurance, the insurance industry would draft and support passage of extensive amendments to Article 21.21 that would strengthen the board's enforcement powers and create a private remedy in Article 21.21.

The attorney general's representatives thought improving Article 21.21 was a good idea, but were concerned that "putting everything over in the Insurance Code," as the industry's legislative strategy came to be called, would not fully protect consumers. The concern of the attorney general's office was based, in part, on the insurance lobbyists, proposal to use the term "person" to describe who could sue under Article 21.21.

To the insurance industry, however, "person" seemed the obvious choice among the alternative models available. The term was already used and defined in Article 21.21, having been part of the NAIC model act adopted in 1957.[94] Adding to Article 21.21 a private remedy for "any person who has been injured,"[95] words that tracked the federal antitrust private remedy for "any person who shall be injured,"[96] would bolster Article 21.21's claim to McCarran-Ferguson's "reverse preemption" should the FTC again attempt to regulate insurance.[97] Indeed, giving to persons injured by unfair and deceptive practices a remedy unavailable to them under the Federal Trade Commission Act would allow Texas the legiti-

mate claim that its law regulated insurance more comprehensively than federal law.

The other model offered by the Insurance Code seemed less desirable than simply using "person." Section 4(1) of Article 21.21, one of the specifically prohibited practices, condemned then, as it does now, misrepresentations to any "policyholder."[98] Similarly, Article 3.62 gave recovery of the delay penalty and attorneys, fees to the "holder" of the policy.[99] But restricting suits to policyholders would preclude private enforcement of other subdivisions of section 4 having nothing to do with the relationship between insurer and insured.[100] Many of section 4's subdivisions dealt then, as they do now, with competitor torts and antitrust concerns.[101] To make all subdivisions of section 4 equally actionable required the use of a more expansive term. Indeed, even to make all of section 4(1) actionable required a broader term than "policyholder" since it prohibited false and misleading statements generally, not just misrepresentations to policyholders.[102] The term "person," whose NAIC-sanctioned definition the legislature had already adopted, raised none of these problems.

Less desirable still to the insurance industry lobbyists was the model offered by the H.B. 417's DTPA provisions, which used "consumer" for whom could sue and "person" for whom could be sued. The term "consumer" was foreign to the Insurance Code, and its definition required that the plaintiff seek "goods" or "services," terms whose definitions did not expressly include insurance. Furthermore, wholesale adoption of the provisions of the DTPA would have been inconsistent with the insurance industry's legislative argument that the business of insurance was unique and deserved its own, separate statutory treatment.

The attorney general's representatives, however, were concerned over the way "person" was defined in Article 21.21. They feared that the reference to "any other entity engaged in the business of insurance" in the definition of "person" might be held to limit the term to only those in the insurance business. Though the insurance industry insisted that the term was not so limited, the attorney general's representatives wanted to avoid the risk of a crabbed construction that would deny the new Article 21.21 cause of action to policyholders and beneficiaries.[103] Therefore, they told the insurance lobby that violations of Article 21.21 and its regulations would also have to be actionable by a "consumer" under section 17.50 of the DTPA. Having already agreed to the principle of a private cause of action for insurance abuses, the insurance industry was in no position to argue against the attorney general's request and agreed to the change to section 17.50. The resulting amendments were added to H.B. 417 in the House Business and Industry Committee in the form of a committee substitute that was then adopted by the full House on April 10, 1973.[104] With the insurance lobby's support now assured, H.B. 417 became law in just over a month.

Thus was born section 16 of Article 21.21 and section 17.50(a)(4) of the DTPA, each giving a private treble damage remedy for abusive insurance practices, but to two differently defined classes of plaintiffs.

III. DEVELOPMENTS SINCE 1973

A. Article 21.21 and Deceptive Trade Practices Act Compared

The basic structure of section 16 of Article 21.21 has remained unchanged. Suits by "any person" against "another" that were authorized in 1973 are authorized today in virtually identical language.[105] Likewise, the legislature has never altered Article 21.21's forty-one year old definition of "person" in section 2(a), and thus it reads today as it did when it was enacted in 1957.

What the legislature has done since 1973, however, is to expand the use of "person." In 1985, as part of legislation imposing tougher proof requirements to recover treble damages, the legislature replaced "company or companies" in section 16 with "person or persons,"[106] thus making clear that the class of defendants against whom such recoveries may be had includes, not only insurance companies, but also their employees and agents.[107]

Significantly, the 1985 legislation, while replacing "company" with "person" to refer to who may be sued under section 16, reenacted that section unchanged in all other respects. And it also reenacted unchanged the definition of "person" in section 2(a). This is important to interpreting the meaning of the statute because of the rule that, when the legislature reenacts a statute materially unchanged, it is presumed to know and adopt the construction that the courts have given the statute.[108] By the time the 1985 legislation was considered and passed, the supreme court had issued two opinions rejecting efforts to restrict the kind of "person" able to sue under Article 21.21 to members of the insurance industry[109] and to "consumers" as defined in the DTPA.[110]

Just as significant to interpreting Article 21.21 is its mandate of liberal construction added by the same 1985 legislation.[111] The liberal construction mandate had always been part of the DTPA and had been the basis, four years earlier, of a supreme court decision rejecting an attempt to narrow the class of those who could sue and be sued under that statute, the court holding that ". . . we must give the Act, under the rule of liberal construction, its most comprehensive application possible without doing any violence to its terms."[112] The legislature's adoption

from the DTPA a provision that so recently had caused the supreme court to reject such a narrowing of that statute draws into question any judicial construction of Article 21.21 that narrows the class of persons able to sue, or be sued, over its violation.[113]

The legislature's unwillingness to alter the definition of "person" under Article 21.21, or to narrow the statute's coverage in any other way, contrasts with its record over the last twenty-five years of amending the DTPA to restrict that statute's application. With the exception of the first two sessions following enactment of the DTPA in 1973, when the legislature broadened the definition of "consumer" to include partnerships, corporations and governmental entities,[114] every amendment thereafter has either narrowed the class of persons who could sue or be sued, or limited the kind of conduct over which suit can be brought. For example, "business consumers" having assets of $25 million or more[115] have been excluded from the DTPA's protections, and new exemptions bar even those still qualifying as consumers from seeking relief if their transaction is too large or they were damaged by "professional services."[116] That the legislature did not act in a similar fashion to restrict the scope of Article 21.21 would likewise run counter to a judicial construction that would accomplish a similar result.[117]

1. BENJAMIN N. CARDOZO, NATURE OF THE JUDICIAL PROCESS at 53 (1921). Holmes makes the same point, though with less flair. *See* Oliver Wendell Holmes, The Common Law at 37 (1881) ("The history of what the law has been is necessary to the knowledge of what the law is.").

2. *See, e.g., Great Am. Ins. Co. v. North Austin Mun. Dist. No. 1*, 908 S.W.2d 415, 421-24 (Tex. 1995) (history of McCarran-Ferguson Act, creation of the Insurance Code, passage of Articles 1.14-1 and 21.21, and of suretyship invoked in support of conclusion that suretyship is not within "business of insurance" under Article 21.21). See also, TEX. GOV'T CODE ANN. § 311.023 (in construing even an unambiguous statute court may consider, *inter alia,* the "object sought to be obtained; circumstances under which the statute was enacted; legislative history; [and the] common law or former statutory provisions, including laws on the same or similar subjects").

3. TEX. INS. CODE ANN. art. 3.62 (applicable to life, health and accident companies), repealed by Act of June 6, 1991, 72nd Leg. R.S. ch. 242, § 12.01(2), 1991 TEX. GEN. LAWS 939, 1133. *See also*, TEX. INS. CODE ANN. art. 3.62-1 (applicable to other companies writing life, health or accident policies), repealed by Act of June 6, 1991, 72nd Leg. ch. 242, § 1201(3), 1991 TEX. GEN. LAWS 939, 1133. These two statutes, both applicable only to life, health and accident policies, were replaced in 1991 with TEX. INS. CODE art. 21.55 requiring the prompt payment of claims under virtually all policies of insurance.

4. 322 U.S. 533 (1944).

5. 16A Appleman Insurance Law and Practice § 8886 (1981).

6. By the 1860s, the insurance industry, nettled by the various licensing requirements imposed by the states, sought relief in both Congress and the courts. To test the constitutionality of these state laws, several New York insurers arranged for their Virginia agent, Paul, to apply for a state license there, refuse to post the required bond and then sell a policy to a Virginia resident. In upholding Paul's conviction for violating the licensing statute, the Supreme Court rejected his argument that the Commerce Clause vested the federal government with the exclusive power to regulate insurance, holding instead that "issuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869); ROBERT H. JERRY, UNDERSTANDING INSURANCE LAW § 21[a] at 55 (1996) (hereinafter cited as "Jerry"). see also, H. ROGER GRANT, INSURANCE REFORM – CONSUMER ACTION IN THE PROGRESSIVE ERA at 157 (1979).

7. Jerry, *supra note*, § 21[a] at 57.

8. Jerry, *supra note*, § 21[a] at 57. The National Association of Insurance Commissioners is composed of the chief insurance regulators from the fifty states, the District of Columbia, and the territories. Organized in 1871 following the Supreme Court's decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869) making regulation of insurance the exclusive preserve of the states, the NAIC provides model statutes and regulations for consideration by the states and studies problems in insurance regulation. Jerry, *supra note*, § 23[b] at 99.

9. 15 U.S.C.A. § 1012. For a discussion of the political context in which the McCarran-Ferguson Act was passed and a profile of its authors see Steven Brostoff, *The Surprising History of McCarran-Ferguson, National Underwriter: Life & Health/Financial Services* 62 (March 5, 1990).

10. 15 U.S.C.A. § 1012(b).

11. 15 U.S.C.A. § 1013(a).

12. 91 Cong. Rec.1442, Feb. 26, 1945 (floor debate on S. 340).

13. 91 Cong. Rec. 1444, Feb. 26, 1945 (floor debate on S. 340).

14. Proceedings of the Seventh-Eighth Annual Session of the National Association of Insurance Commissioners, Adjourned Meeting, New York, N.Y., Dec. 8-11, 1946, Annual Meeting, Atlantic, City, N.J., June 1-5, 1947, at 392-400 (hereinafter cited as the "NAIC 1947 Model Unfair Practices Act"). The model act has been revised over the years and the current version, called the "Unfair Trade Practices Act", is found in NAIC Model Laws, Regulations and Guidelines at 880-1 (Rev'd ed. 1994). To see what any NAIC model law or regulation provided on a given date in history, however, requires use of the NAIC Proceedings, copies of which are maintained at the library of the Texas Department of Insurance in Austin, Texas.

15. *Compare* NAIC 1947 Model Unfair Practices Act § 3, note *supra*, at 393 ("No person shall engage in this state in any trade practice which is defined in this act as, or determined pursuant to this Act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.") with 15 U.S.C.A. § 45(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

16. NAIC 1947 Model Unfair Practices Act § 4, note *supra*, at 393.

17. NAIC 1947 Model Unfair Practices Act § 4, note *supra*, at 393.

18. *See* supra text accompanying notes 12 and 13.

19. Act of June 28, 1951, 52nd Leg., R.S., ch. 491 § 5, 1951 TEX. GEN. LAWS 868, 1096.

20. This was certainly Senator McCarran's understanding, one which he conveyed to his colleagues during Senate consideration of the McCarran-Ferguson Act:

> … The Senator will recall the Southeastern Underwriters case. The decision was startling. It created consternation in the insurance business because by previous decisions rendered during the past 50 years or more we were entitled to believe that the business of insurance was not to be classified as interstate commerce. The Supreme Court of the United States specifically, directly, and emphatically put it into the category of interstate commerce. It put it squarely under the Sherman Act, the Clayton Act, and other Acts. The pending bill is for the purpose of creating a moratorium for 3 years in order that the business of insurance shall not be interfered with by any Federal power under either the Clayton Act or the Sherman Act. So during the period of moratorium the various states themselves may take steps to regulate the business of insurance.

91 Cong. Rec. 1443, Feb. 26, 1945 (floor debate on S. 340) (emphasis added).

21. Act of March 22, 1909, 31st Leg., R.S., ch. 108, § 19, 1909 Tex. Gen. Laws 192, 198-99, amended by, Act of May 17, 1929, 41st Leg., 1st C.S., ch. 3, §1, 1929 Tex. Gen. Laws 5 (enacting Tex. Rev. Civ. Stat. Ann. art. 5053), repealed by Act of June 28, 1951, 52nd Leg., R.S., ch. 491 §4, 1951 Tex. Gen. Laws 868, 1095.

22. No insurance company could make or permit any distinction or discrimination between persons of like class and life expectancy in premiums or rates for, or amount of, life insurance or endowments; no company or agent thereof could make contract or agreement of insurance not contained in the policy; no company or officer, agent, solicitor or representative thereof could give a rebate or anything of value not specified in the policy; no company or officer, agent, solicitor or representative thereof could give, sell or offer to sell any stock, bond, dividend or profit in the company issuing the policy; and no company could issue a policy allowing it to share in any tax or charge against the premium on any other policy. Act of June 28, 1951, 52nd Leg., R.S., ch. 491, § 1, 1951 TEX. GEN. LAWS 868, 1075-6. The only provision of the new Insurance Code that prohibited insurer misrepresentation, Article 21.20, applied only to life insurance companies just as it does today. *Id*. at 1075; TEX. INS. CODE ANN. art. 21.20. Article 21.20 was based on the same 1909 statute that enacted the predecessor to Article 21.21. Act of March 22, 1909, 31st Leg., R.S., ch. 108, § 67, 1909 TEX. GEN. LAWS 192, 214.

23. Act of June 28, 1951, 52nd Leg., R.S. ch. 491, § 1, 1951 TEX. GEN. LAWS 868, 1075-6.

24. Under its resolution of December 15, 1953, the Commission launched an investigation into the advertising practices of 1,400 companies issuing accident and health policies and reviewed hundreds of policyholder complaints. Formal complaints were issued against 41 companies alleging false and misleading advertising, the majority of which were contested on McCarran-Ferguson grounds. See Annual Rep't of the Federal Trade Commission for the Fiscal Year Ended June 30, 1954 at 26; Annual Rep't of the Federal Trade Commission for the Fiscal Year Ended June 30, 1955 at 40; Annual Rep't of the Federal Trade Commission for the Fiscal Year Ended June 30, 1956 at 40.

25. In re American Hosp. & Life Ins. Co., 52 F.T.C. 1100 (1956).

26. In re National Cas. Co., 52 F.T.C. 1385 (1956).

27. *American Hosp*., 52 F.T.C. at 1118-22; *National Cas.,* 52 F.T.C. at 1397-1401.

28. The Commission's analysis of the McCarran-Ferguson Act is contained in *American Hosp*., 52 F.T.C. at 1107-22, and was simply adopted by reference without further comment in *National Cas.*, 52 F.T.C. at 1397.

29. *American Hosp. & Life Ins. Co. v. Federal Trade Comm'n*, 243 F.2d 719 (5th Cir. 1957), *aff'd*, 357 U.S. 560 (1958).

30. *National Cas. Co. v. Federal Trade Comm'n*, 245 F.2d 883 (6th Cir. 1957), *aff'd*, 357 U.S. 560 (1958).

31. *American Hosp.*, 52 F.T.C. at 1108. The Texas insurer was licensed to do business in Arizona, Arkansas, Colorado, New Mexico, Oklahoma, Tennessee, and Texas. *American Hosp.*, 52 F.T.C. at 1101, 1107. With regard to the states other than Texas, the hearing examiner ruled that all but Mississippi "fully regulates the business of insurance by legislative enactment and that to the extent such regulation exists our jurisdiction has been withdrawn by the McCarran-Ferguson Act." *American Hosp.*, 52 F.T.C. at 1108.

32. *National Cas*., 52 F.T.C. at 1397.

33. TEX. INS. CODE art. 21.20.

34. *National Cas*., 52 F.T.C. at 1386.

35. *American Hosp*., 52 F.T.C. at 1108 - 1117.

36. Thus in National Casualty the Sixth Circuit noted that:

> The Commission does not challenge the validity of any state statute regulating the business of insurance, nor the validity of the McCarran-Ferguson Act. It points out that state laws have no extra-territorial effect and cannot regulate the business of insurance beyond the borders of the particular state;… [that the McCarran-Ferguson Act granted the Commission authorization] to regulate insurance… [by] regulating the use of the interstate channels of commerce; and that the Federal and state laws in the field of insurance supplement and reinforce one another in order to provide full protection to the public.

National Cas. Co. v. Federal Trade Comm'n, 245 F.2d 883, 886 (6th Cir. 1957). Similarly, in *American Hospital* the Commission did not attack the adequacy of the state laws themselves, but rather the power of the states to regulate the advertising of out of state companies.

> The Commission urges that a state does not have and never did have the power adequately to control the advertising practices of out-of-state insurance companies doing business within its boundaries.

American Hosp. & Life Ins. Co. v. Federal Trade Comm'n, 243 F.2d 719, 724 (5th Cir. 1957).

37. *Federal Trade Comm'n v. National Cas. Co*., 355 U.S. 867 (1957); *Federal Trade Comm'n v. American Hosp. & Life Ins. Co.*, 355 U.S. 867 (1957).

38. *Federal Trade Comm'n v. National Cas. Co*. consolidated with *Federal Trade Comm'n v. American Hosp. & Life Ins. Co.,* 357 U.S. 560 (1958).

39. Act of May 8, 1957, 55th Leg., R.S. ch. 198, 1957 TEX. GEN. LAWS 401.

40. *Federal Trade Comm'n v. National Cas. Co*. consolidated with *Federal Trade Comm'n v. American Hosp. & Life Insurance Co.*, 357 U.S. at 564. The court's description, which applied not just to Texas but to "[e]ach State in question," was accompanied by a footnote stating that "[a]t the time the complaints were filed thirty-six states had enacted the 'Model Unfair Trade Practices Bill for Insurance[]' [and] [e]ight others had statutes essentially the same in effect as the 'Model Bill.'" *Id*., n. 6. No reference was given for this statement. The complaint in *American Hospital* was filed on October 14, 1954 (52 F.T.C. 1100) and the one in *National Casualty* on March 11, 1955 (52 F.T.C. 1385).

41. Act of May 8, 1957, 55th Leg., R.S. ch. 198, § 2, 1957 TEX. GEN. LAWS 401, 406.

42. Act of May 8, 1957, 55th Leg., R.S. ch. 198, § 1, 1957 TEX. GEN. LAWS 401 (current version at TEX. INS. CODE ANN. art. 21.21, § 1). The reference to the McCarran-Ferguson Act was eliminated in 1993. Act of June 17, 1993, 73rd Leg., R.S. ch. 685, § 20.16, 1993 TEX. GEN. LAWS 2559, 2704.

43. For a discussion of the use of "person" in referring to whom may sue and be sued under Article 21.21, § 16, *see infra* § 2:8-2:10.

44. Act of May 8, 1957, 55th Leg., R.S. ch. 198, § 1, 1957 Tex. Gen. Laws 401-02 (current version at Tex. Ins. Code Ann. art. 21.21, § 2).

45. Act of May 8, 1957, 55th Leg., R.S. ch. 198, § 3, 1957 TEX. GEN. LAWS at 402 (current version at TEX. INS. CODE ANN. art. 21.21, § 3).

46. With the exception of a later amendment to the unfair discrimination provision, TEX. INS. CODE art. 21.21, § 4(7), the text of the eight prohibited practices enacted in 1957 has remained unchanged. Compare Act of May 8, 1957, 55th Leg., R.S. ch. 198, § 1, 1957 TEX. GEN. LAWS 401, 402-403 with TEX. INS. CODE ANN. art. 21.21, § 4.

47. Act of May 8, 1957, 55th Leg., R.S. ch. 198, § 1, 1957 TEX. GEN. LAWS 401, 402 (current version at TEX. INS. CODE ANN. art. 21.21, § 4(1).

48. Act of May 8, 1957, 55th Leg., R.S. ch. 198, § 1, 1957 TEX. GEN. LAWS 401, 402-03 (current version at TEX. INS. CODE art. 21.21, § 4(2).

49. Act of May 8, 1957, 55th Leg., R.S. ch. 198, § 1, 1957 TEX. GEN. LAWS 401, 404 (current version at TEX. INS. CODE art. 21.21 § 5).

50. Act of May 8, 1957, 55th Leg., R.S. ch. 198, § 1, 1957 TEX. GEN. LAWS 401, 404-05 (current version at TEX. INS. CODE art. 21.21, § 6).

51. Act of May 8, 1957, 55th Leg., R.S. ch. 198, § 1, 1957 TEX. GEN. LAWS at 401, 405 (current version at TEX. INS. CODE art. 21.21, § 10).

52. Act of June 12, 1969, 61st Leg., R.S. ch. 706 1969 TEX. GEN. LAWS 2051 (current version at TEX. INS. CODE art. 21.21, § 13).

53. Rules and Regulations of The State Board of Insurance of Texas On Unfair Competition and Unfair Practices of Insurers and On Misrepresentation Of Policies, and Including Regulation of Insurance Trade Practices In Respect of Advertising and Solicitations, Board Order 18663, December 3, 1971 (hereinafter cited as "Board Order 18663") (current version at 28 TEX. ADMIN. CODE §§ 21.1-21.5). Copies of Board Order 18663 and all other original Board Orders may be obtained from the Chief Clerk, Texas Department of Insurance, Austin, Texas.

54. Board Order 18663, *supra* note (general remarks and description of action taken).

55. Board Order 18663, *supra* note, § 1.

56. Board Order 18663, *supra* note, § 3.

57. Board Order 18663, *supra* note, § 4(a).

58. Board Order 18663, *supra* note, § 4(b).

59. Act of June 13, 1973, 63rd Leg., R.S. ch. 319, §1, 1 TEX. GEN. LAWS 735, 736. (current version at TEX. INS. CODE ANN. art. 21.21-2).

60. Act of May 23, 1967, 60th Leg., R.S., ch. 274, §2, 1967 TEX. GEN. LAWS 608, 658.

61. Act of May 23, 1967, 60th Leg., R.S., ch. 274, §2, 1967 TEX. GEN. LAWS 608, 658-9

62. Act of May 23, 1967, 60th Leg., R.S., ch. 274, §2, 1967 TEX. GEN. LAWS 608, 659.

63. Act of May 23, 1967, 60th Leg., R.S., ch. 274, §2, 1967 TEX. GEN. LAWS 608, 658.

64. Act of May 23, 1967, 60th Leg., R.S., ch. 274, §2, 1967 TEX. GEN. LAWS 608, 610, 656 (current version at TEX. REV. CIV. STAT. ANN. arts. 5069-1F.001 et seq.).

65. Act of June 10, 1969, 61st Leg., R. S., ch. 452, §1, 1969 TEX. GEN. LAWS 1504.

66. Act of June 10, 1969, 61st Leg., R. S., ch. 452, §1, 1969 TEX. GEN. LAWS 1504, 1505.

67. Act of June 10, 1969, 61st Leg., R. S., ch. 452, §1, 1969 TEX. GEN. LAWS 1504, 1506-08.

68. Act of June 10, 1969, 61st Leg., R. S., ch. 452, §1, 1969 TEX. GEN. LAWS 1504, 1505.

69. Act of June 10, 1969, 61st Leg., R. S., ch. 452, §1, 1969 TEX. GEN. LAWS 1504, 1505.

70. Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 1, 1973 TEX. GEN. LAWS 322.

71. Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 1, 1973 TEX. GEN. LAWS 322, 322-42. H.B. 417 also repealed article 5069-10, the previous deceptive trade practice statute. Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 3, 1973 TEX. GEN. LAWS 322, 342.

72. Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 2, 1973 TEX. GEN. LAWS 322, 335-42.

73. Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 1, 1973 TEX. GEN. LAWS 322, 323-24 (current version at TEX. BUS. & COMM. CODE ANN. § 17.46).

74. Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 3, 1973 TEX. GEN. LAWS at 342 (repealing TEX. REV. CIV. STAT. art. 5069-10). H.B. 417 did contain an exemption section, but much narrower than that in the prior statute.

75. Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 1, 1973 TEX. GEN. LAWS 322, 324-26 (current version at TEX. BUS. & COMM. CODE ANN. § 17.47).

76. Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 1, 1973 TEX. GEN. LAWS at 326-27 (current version at TEX. BUS. & COMM. CODE ANN. § 17.50), 338 (current version at TEX. INS. CODE ANN. art. 21.21, § 16).

77. Though not examining their historical causes, one law commentator points to three consumer movements in United States history: the first associated with Upton Sinclair's The Jungle and leading to the Federal Food and Drug Acts in 1906; the second in the mid-1930's resulting in the Wheeler-Lea amendments to the Federal Trade Commission Act giving the FTC authority over "unfair or deceptive acts or practices," thus eliminating the need for proof of an adverse effect on competition in order to act against conduct harmful to consumers; and the third in the 1960s and 1970s, distinguished from the others by passage of state consumer protection statutes. William A. Lovett, *State Deceptive Trade Practice Legislation,* 46 TULANE L. REV. 724, 728-30 (1972) (hereinafter cited as "Lovett").

78. P.L. 92-573, Oct. 27, 1972, 86 Stat. 1207, 5 U.S.C.A. §§ 5314-15; §§ 2051-2084.

79. P.L. 93-637, Jan. 4, 1975, 88 Stat. 2183, 15 U.S.C.A. §§ 45-46, 49-50, 52, 56, 57a-57c, 2301-2312.

80. P.L. 90-321, Title I, May 29, 1968, 82 Stat. 146, 15 U.S.C.A. §§ 1601-1613, 1631-1646, 1661-1665, 1665a, 1666. 1666a-1666j, 1667, 1667a-1667e, 1671-1677.

81. Federal Trade Commission, National Consumer Protection Hearings at 4 (Nov. 1968).

82. Executive Order 11583 of Feb. 24, 1971, 36 Fed. Reg. 3509 reprinted in Codification of Presidential Proclamations and Executive Orders, January 20, 1961 – January 20, 1977 at 685 (1979). The order set forth the case for consumer protection in a free market economy.

> Consumer protection fosters a market place in which our competitive economic system flourishes best. It is good for businessmen because it gives the consumer greater confidence in the goods and services provided by business. It is good for consumers because it reinforces the concept of buyer's rights:
>
> - the right to make an intelligent choice among products and services;
> - the right to accurate information on which to make a free choice;
> - the right to expect that the health and safety of the buyer is taken into account by those who seek his patronage;
> - the right to register dissatisfaction, and have a complaint heard and weighed, when a buyer's interests are badly served.

Id.

83. President Nixon's support of Mrs. Knauer buckled, however, when business interests recoiled at her proposal for legislation authorizing consumer class actions based on violations of the Federal Trade Commission Act. The administration retreated to supporting only individual suits that could only be brought for a violation of a FTC cease and desist order. Consumer advocates rejected this proposal as worthless, but could never muster the support to pass their own. Lovett, *supra* note, at 279-80. For a discussion of the consumer class action measures then pending before Congress as well as a statement of the reasons for, and a critical look at the arguments against, class actions as a means of redressing widespread consumer fraud that results in claims too small to bring as individual actions see Herbert R. Newberg, *Federal Consumer Class Action Legislation: Making the System Work,* 9 HARV. J. LEG. 217 (1972).

84. The thirty-six states were Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, and Washington. The private remedies varied widely, from providing only for injunctive relief with no attorneys' fees unless the deception was willful (New Mexico) to treble damages, court costs and attorneys' fees (Hawaii). Lovett, *supra* note at 724, 746-47.

85. Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TULANE L. REV. 427, 465-71 (1984). In Arizona and Delaware the private remedy had been implied by the courts. *Id.* at 471, n.1. The jurisdictions lacking a private remedy were Arkansas, Guam, Iowa, Nevada, North Dakota, Oklahoma, Puerto Rico, and the Virgin Islands. *Id.* at 467-70.

86. Attorney General Hill's legislative representatives during the 1973 session and two of H.B. 417's principal drafters were Joe Longley, then Chief of the Antitrust and Consumer Protection Division, and Liz Levatino (now Liz Lacy), then Assistant Chief of the Division and now Associate Justice of the Supreme Court of Virginia. Mr. Longley and Philip Maxwell, who followed Mr. Longley as consumer chief in 1975, also worked on Hill's 1972 campaign for attorney general and helped develop his consumer and environmental protection programs. The account of the 1972 campaign and the 1973 legislative session that followed is based on the personal recollections and notes of the authors and has been confirmed by consultation with Justice Lacy.

87. For a discussion of the Sharpstown scandal, the 1972 election and the governmental reform measures considered during the 1973 legislative session see CHARLES DEATON, THE YEAR THEY THREW THE RASCALS OUT (Shoal Creek Publishers, Austin 1973); *see also* HARVEY KATZ, SHADOW ON THE ALAMO (Doubleday 1972) (discussing scandal and correctly predicting political repercussions but published before 1972 election).

88. Copies of H.B. 417 and S.B. 75 as originally introduced, as well as amendments added during the session, are available from the Texas Legislative Reference Library, State Capitol Building, Austin, Texas.

89. As originally introduced, H.B. 417 and S.B. 75 would have provided, in § 17.50(a)(4), a cause of action for:

> a failure by any person to comply with the provisions of Chapter 2, 3, 4, 5, or 7 [of the Texas Credit Code], or the rules or regulations promulgated under these chapters.

90. As originally introduced, H.B. 417 and S.B. 75 would have enacted a § 17.47 of the Business & Commerce Code empowering the attorney general's "consumer protection division [to] issue, after hearing, regulations declaring other acts or practices to be false, misleading, or deceptive acts or practices."

91. Hearing on H.B. 417 Before the House Committee on Business and Industry, Feb. 27, 1973, reprinted in Report of the Joint Committee on Deceptive Trade Practices, 71st Leg. (Dec. 20, 1988) at 102 (remarks of Will Davis, representing American National Insurance Co. and Texas Legal Reserve Officials Association) ("H.B. 417 superimposed on top of the Texas Insurance Code creates dual regulation, conflicting regulation and will cause us to be answering two masters.") (hereinafter cited as "1973 House Business and Industry Committee Hearing"); Hearing on S.B. 75 Before the Senate Committee on Human Resources, Feb. 14, 1973, reprinted in Report of the Joint Committee on Deceptive Trade Practices, 71st Leg. (Dec. 20, 1988) at 311-47 (remarks of Robert Sneed, representing Texas Association of Life Insurance Officials), 349-63 (remarks of Will Davis) (hereinafter cited as "1973 Senate Human Resources Committee Hearing"). The industry's concern over the potential for regulatory conflict was echoed by the Insurance Commissioner, Clay Cotton. 1973 House Business and Industry Committee Hearing at 529-30.

92. 1973 Senate Human Resources Committee Hearing, supra, note, at 350 (remarks of Will Davis):

> * * * That to the extent that the United States Congress has allowed and required the insurance industry in this state and the State of Texas to regulate advertising and deceptive trade practices and consistent with the times they have changed their attitude in any way about advertising and deceptive trade practices and as they have changed their mind from time to time, the legislature of this state and the insurance industry of this state have come to the legislature and passed laws changing the advertising and deceptive practices acts relating to insurance to conform with the requirement of the Federal Trade Commission or the United States Congress. Suffice to say, that the Texas insurance industry has consistently, consistently been in step with advertising and deceptive trade practices, regulatory authorities to this very day. * * * I simply say that reform didn't start until 1973 in the insurance industry. It started in 1955 and '57, and has been a consistent, evolving process largely with the support of the insurance industry in this state.

93. 1973 House Business and Industry Committee Hearing, *supra* note, at 488-89 (remarks of Will Davis); *see also, Id*. at 525 (remarks of Sam Winters representing the Texas Life Convention) ("We abhor dual regulation. We think it is best to regulate it in the Insurance Department, and we think they are doing a good job. If you want to give them some more remedies, I hope you will consider that."); *see also*, 1973 Senate Human Resources Committee Hearing, *supra* note, at 364 (remarks of Sam Winters) ("We think that the expertise of the Insurance Department should be used. We think they are the ones that have it and that's where it should be and I think they ought to have the power you want to give them."), 341-42 (remarks of Robert Sneed) ("We ought to either be under the State Board of Insurance or the Attorney General. And all we ask, and all we urge you, put us one place or the other. Either give us to the State Board of Insurance. If it needs to assess additional fines of $2,000 to $10,000 instead of $50 to $500 as Article 21.21 provides, then raise the limit. If the attorney's fee provision as Senator Mauzy is pointing out needs to be expanded, then expand it. Just put us one place or the other. This is all we are asking."), 363 (remarks of Will Davis) ("no evidence to support the validity of an argument that with the powers in this bill the Insurance Department could not and would not do a better job in the field of insurance consumer protection that the Attorney General because they won,t be deluged with automobile dealers and retail firms. They will be doing only insurance consumer protection and not having to worry about everybody else who the Attorney General is with regulatory authority in this bill."), 377-8 (Insurance Commissioner Clay Cotton agreeing with Senate committee members Meier and Schwartz that a workable alternative to H.B. 417 would be to amend the Insurance Code to incorporate the DTPA's regulatory, enforcement, and private remedy provisions).

94. The definition of "person" came from the NAIC model act and was enacted in Texas in 1957 when the model law was adopted as revised Article 21.21. The definition is the same today as it was when adopted in 1957.

> Sec. 2. When used in this Act:
>
> (a) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters and life insurance counselors.

TEX. INS. CODE art. 21.21, § 2(a).

95. As passed, H.B. 417 provided a cause of action in section 16(a) of Article 21.21 for "[a]ny person who has been injured . . . . "Act of May 21, 1973, 63rd Leg., R.S. ch. 143, § 2, 1973 Tex. Gen. Laws 322, 338. Now the cause of action is for "[a]ny person who has sustained actual damages…" TEX. INS. CODE ANN. art. 21.21, § 16(a).

96. 15 U.S.C.A. § 15(a).

97. By 1973, one federal district court had ruled that a private remedy under state law was not required for the McCarran-Ferguson Act to apply. *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 26 (D. Ore. 1966). This ruling certainly did not foreclose an attack on the Texas, regulatory scheme on this ground, however, and adding a private remedy to Article 21.21 most certainly would.

98. TEX. INS. CODE ANN. art. 21.21, §4(1).

99. TEX. INS. CODE ANN. art. 3.62 (repealed) (now TEX. INS. CODE art. 21.55).

100. Indeed, a violation may actually benefit a policyholder, such as when he receives an unlawful premium rebate. See TEX. INS. CODE ANN. art. 21.21, § 4(8). A policyholder getting a cut in his premium can hardly be expected to lay self-interest aside, assume the role of a vigilant private attorney general and hail the wrongdoer into court. A competing insurance company or agent whose business is stolen away by such practices, by contrast, is clearly damaged by such conduct and has the incentive to bring suit.

101. *See* TEX. INS. CODE ANN. art. 21.21, § 4(3) (false, maliciously critical, or derogatory statements "calculated to injure any person engaged in the business of insurance"); §4(4) (boycotts or intimidation resulting in "unreasonable restraint of, or monopoly in, the business of insurance"). That Article 21.21 extends beyond policyholder concerns is not only reflected in the text of its prohibitions, but also in its title ("Unfair Competition and Unfair Practices") and its purpose (to define and prohibit "all… unfair methods of competition or unfair or deceptive acts or practices…"). TEX. INS. CODE ANN. art. 21.21 (Title) (emphasis added); Id., § 1(a) (purpose) (emphasis added).

102. Section 4(1) prohibits, in addition to misrepresentations to policyholders, "[m]aking, issuing, circulating, or causing to be made, issued or circulated,

any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon…" TEX. INS. CODE ANN. art. 21.21, § 4(1).

103. Five years after the passage of H.B. 417, the Texas Supreme Court ruled that "person" was not so limited. *Ceshker v. Bankers Commercial Life Ins. Co*., 568 S.W.2d 128, 129 (Tex. 1978) (per curiam) ("We disapprove the holding which construed the Code to limit the term 'person' to one who is engaged in the business of insurance."). That an insurance company urged a narrow construction of "person" excluding consumers, however, shows that the concern of the attorney general's office in 1973 was well founded. In later cases, insurers argued to the supreme court that the use of "person" in the Article 21.21 private remedy embraced only consumers. This, too, was rejected. *See Hi-Line Elec. Co v. Travelers Ins. Co*., 593 S.W.2d 953 (Tex. 1980) (per curiam) (refusal of application for writ of error "should not be interpreted as approving the conclusion of the court of civil appeals that a private action under article 21.21 of the Insurance Code must be based on the Deceptive Trade Practices Act nor as approving the court's holding that, 'A person as used in article 21.21(16)(a) must be a consumer as defined in section 17.50 of the DTPA.'"); *Marshall v. Aetna Cas. & Sur. Co*., 724 S.W.2d 770, 772 (Tex. 1980) ("Article 21.21 does not incorporate the entire Deceptive Trade Practices Act which would require proof that Marshall was a consumer of goods or services. Instead, article 21.21 provides a cause of action to a person who has been injured by an insurance carrier who engages in an act proscribed by section 17.46.").

104. H.J. of Tex., 63rd Leg., R.S. 2091, 2104-13.

105. Over the years there have been changes to the language describing the harm to the person who is bringing suit. As originally passed in 1973, Article 21.21, § 16(a) provided a cause of action for "[a]ny person who has been injured by another's" violations. Act of May 21, 1973, 63rd Leg., R.S., ch.143, § 2, 1973 TEX. GEN. LAWS 322, 338. In 1985, the words "been injured by" were supplanted by "sustained actual damages as a result of" so that the cause of action was accorded to "[a]ny person who has sustained actual damages as a result of another's" violations. Act of April 4, 1983, 69th Leg., R.S., ch. 22, § 3, 1985 TEX. GEN. LAWS 395. In 1995, "as a result" was deleted in favor "caused by" thus yielding the current version which describes the remedy as one for "[a]ny person who has sustained actual damages caused by another's" violations. Act of June 8, 1995, 74th Leg. R.S., ch. 414, § 13, 1995 TEX. GEN. LAWS 2988, 3800. (current version at TEX. INS. CODE art. 21.21, § 16(a)). But none of these changes narrowed the class of those able to bring suit.

106. Act of April 4, 1985, 69th Leg., R.S., ch 22, §3, 1985 TEX. GEN. LAWS 395.

107. *Liberty Mut. Ins. Co. v. Garrison Contractors Co, Inc.*, 966 S.W.2d 482 (Tex. 1998). Further evidence that the legislature knew and approved of the broad definition of "person" in Article 21.21 is drawn from another bill passed in 1985, this one amending § 14 to replace "insurer" with "person" in referring to those against whom an administrative class action may be brought. Act of May 24, 1985, 69th Leg., R.S., ch. 160, 1985 TEX. GEN. LAWS 714. According to the bill analysis, the term insurer is "much narrower than the word 'person'… " and hence substituting the latter for the former "will broaden the application of the section…" House Comm. on Insurance, Bill Analysis, Tex. S.B. 1127, 69th Leg., R.S. (1985). Copies of the bill analysis are available from the Texas Legislative Reference Library, State Capitol Building, Austin, Texas.

108. *Coastal Indus. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916, 918 (Tex.1978) ("The rule is well settled that when a statute is re-enacted without material change, it is presumed that the legislature knew and adopted the interpretation placed on the original act and intended the new enactment to receive the same construction.").

109. *Ceshker v. Bankers Commercial Life Ins. Co.,* 568 S.W.2d 128 (Tex. 1978).

110. *Hi-Line Elec. Co. v. Travelers Ins. Co.,* 593 S.W.2d 953 (Tex. 1980).

111. Act of April 4, 1985, 69th Leg., R.S., ch. 22, § 1, 1985 TEX. GEN. LAWS 395.

112. *Cameron v. Terrell & Garrett, Inc.,* 618 S.W.2d 535, 541 (Tex. 1981).

113. *See State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 435-36 (Tex. 1995) (that DTPA and Article 21.21 are "interrelated" and were passed in 1973 "as part of reform package of consumer legislation" makes it "logical" to hold that recovery of mental anguish requires the same proof under both statutes).

114. Act of May 23, 1977, 65th Leg., R.S., ch. 216, § 1, 1977 TEX. GEN. LAWS 600.

115. Act of June 1995, 1983, 68th Leg., R.S., ch. 883, § 2, 1983 TEX. GEN. LAWS 4943, 4944.

116. Act of June 8, 1995, 74th Leg., R.S., ch. 414, § 4, 1985 Tex. Gen. Laws 2988, 2991.

117. *C.f.* Riverside Nat,l Bank v. Lewis, 603 S.W.2d 169, 175 (Tex. 1980) (emphasis in original):

> The presence of the words "money or credit" within the definition of "consumer" in the Home Solicitations Act, and their corresponding absence from the analagous provision in the DTPA, indicates that the seeking of an "extension of credit" is not the seeking of a "service" as defined in the DTPA. Obviously, the Legislature knew how to include the extension of credit and borrowing of money within the scope of coverage of protective legislation, when it intended to cover such transactions. The simple addition of the words "money or credit" within the definition of "consumer" in the DTPA would have accomplished such a purpose in the DTPA. The Legislature's exclusion of these terms from the DTPA, in light of its contemporaneous inclusion of the same terms in the Home Solicitations Transactions Act, evidences a clear legislative intent that the extension of credit was not to be covered under the DTPA.

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Comments FROM THE EDITOR

BY CHRISTOPHER W. MARTIN
Martin, Disiere, Jefferson & Wisdom, L.L.P.

I want to recognize the great work that Jim Cornell continues to do for the Insurance Law Section in disseminating the new insurance decisions every week as they are issued. Jim reviews hundreds of cases per month in order to locate and circulate to our members copies of insurance coverage and bad faith decisions that might be of interest to those in our Section. This is a thankless job which Jim performs every week of every year. The fact that he has done this work for so many years is a great testimony to the character and perseverance of Jim. On behalf of all of our members, I want to thank Jim for his great service to our Section.

We always need new articles for our Journal. If you have written on an insurance-related topic of general interest, or if you would like to write one, please let me know. Your input would be welcome. We have openings still available for our Summer and Fall 2008 editions of the Journal. We thank you for the opportunity to serve you through this publication. It is an honor and a privilege.

Christopher W. Martin,
Martin, Disiere, Jefferson & Wisdom, L.L.P.
Editor-In-Chief

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