CAUSE NO. 98-0218

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

CROWN LIFE INSURANCE COMPANY

Petitioner

v.

WILLIAM E. CASTEEL

Respondent

AMICUS CURIAE BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE

Steve McConnico
Jane Webre
SCOTT, DOUGLASS & MCCONNICO, L.L.P.
600 Congress Ave., Suite 1500
Austin, Texas 78701

Phillip E. Stano
American Council of Life Insurance
1001 Pennsylvania Ave., N.W.
Fifth Floor
Washington, D.C. 20004-2599

COUNSEL FOR AMICUS CURIAE
AMERICAN COUNCIL OF
LIFE INSURANCE

April 24, 1998

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

Statutes

CAUSE NO. 98-0218

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

CROWN LIFE INSURANCE COMPANY

Petitioner

v.

WILLIAM E. CASTEEL

Respondent

AMICUS CURIAE BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE

TO THE HONORABLE SUPREME COURT OF TEXAS:

The American Council of Life Insurance ("ACLI") files this Amicus Curiae brief in support of the petition for review filed by Petitioner Crown Life Insurance Company ("Crown Life") in this action. ACLI encourages this Court to reverse the judgment of the court of appeals insofar as it holds that an insurance agent has standing under the Texas Insurance Code to sue the insurer for whom it sells insurance for representations regarding the terms and conditions of the insurance policies he sells. ACLI also encourages this Court to affirm the judgment of the court of appeals insofar as it denied DTPA standing to such an agent.

INTEREST OF AMICUS CURIAE

Amicus Curiae ACLI is the nation's largest non-profit insurance trade association. ACLI is made up of 580 life insurers which write approximately 91% of the life insurance issued in the United States. Approximately 433 of ACLI's members are licensed to do business in Texas, and they write about 89.5% of the life insurance business in Texas.

ACLI has paid all fees for preparing this brief.

ACLI has no direct interest in this litigation. ACLI is concerned, however, with the proper and orderly development of the body of insurance law in Texas and around the nation. Specifically, ACLI would urge this Court to hold that an insurance agent has no standing under the Texas Insurance Code, and has no derivative standing under the DTPA, to bring an independent cause of action against an insurer.

FACTUAL BACKGROUND

Respondent William E. Casteel ("Casteel") is an insurance agent who sold life insurance policies issued by Crown Life. Casteel is neither a Crown Life insured nor a third party beneficiary under any Crown Life policy. Casteel did not purchase any life insurance policy from Crown Life. What Casteel did was sell Crown life policies to others, such as Plaintiff Randall Ferguson, and collect a commission on those sales.

As part of their common goal in selling and issuing policies to insureds, Casteel and Crown Life worked together to explain and promote the Crown Life policies to their customers. Any information Crown Life gave to Casteel regarding the scope or conditions of its policies was in furtherance of that common goal. That is, Crown Life

would give policy information to Casteel, who would then pass that information along to customers in hopes of selling policies to the customers. Any representations Crown life made to Casteel regarding the policies were in furtherance of their common sales to the insureds, and not independently used or relied upon by Casteel. Crown Life and Casteel thereby worked together and derived mutual benefits from their cooperation: Crown Life sold policies and Casteel earned commissions on the sales.

Casteel sued Crown Life alleging that Crown Life had misrepresented to him the nature and quality of certain policies, and that he suffered damages when he passed that information on to his insurance customers. The damages he alleges are not policy benefits, or commissions not paid, or claims for contribution and indemnity for claims against him by insureds, but items such as reputation damages, mental anguish, and the like. Those purely personal damages are unrelated to any policy benefits that flow to Crown Life insureds or policy beneficiaries.

This Brief addresses a single issue before this court: whether an insurance agent has standing to assert such an independent cause of action against an insurer under the Texas Insurance Code or the DTPA for representations the insurer made to the agent regarding the scope and conditions of the policies. The sole question addressed here is whether Casteel has standing to assert an independent statutory cause of action against Crown Life, regardless of any liability to any insured.

BRIEF OF THE ARGUMENT

A. AN AGENT HAS NO INDEPENDENT STANDING TO SUE AN INSURER UNDER THE INSURANCE CODE

1. Granting agents an independent statutory cause of action against insurers ignores the nature of their relationship and sales transactions.

The court of appeals held that an insurance agent may sue the insurance company for which it sells policies for representations as to the terms of those policies, even though the agent and the insurer work together to sell such policies to insureds and achieve mutual benefits from such sales. Giving agents independent standing to sue the insurer in such a circumstance ignores the nature of the relationship between agent and insurer, and specifically their relationship regarding the sale of insurance policies.

Insurers provide information to their agents regarding policies for the purpose of passing the information on to potential insureds in an effort to sell policies. In that respect, the agent does not act alone, but acting in conjunction with the insurer, the agent is in fact the face of the insurer to the public. The exchange of information is therefore for the parties' mutual benefit, in that the insurer sold policies and the agent receives commission on such sales. There is therefore cooperation in the joint venture between insurer and agent, with insurer and agent together selling policies, and the insured purchasing the policies and receiving the policy benefits. The agent does not purchase the policy in that instance, and receives no policy benefits. The agent, rather, markets the policy to an insured. The court of appeals' holding grants the agent an independent statutory cause of action against the insured in that case, not for any policy benefits, or

for contribution or indemnity for claims by insureds for misrepresentations, but an independent cause of action for his own personal damages.

By granting agents independent standing to sue insurers for non-policy damages, the court of appeals ignores the nature of the insurer/agent working relationship, which is one of cooperation and mutual benefit. The agent has achieved his own benefit -- commission from sales -- from the very representations he may later base his Insurance Code suit on. Granting agents such an independent statutory cause of action therefore injects an adversarial element into what is and ought to be a cooperative venture. And it does so by using a statute that was intended to protect insureds from the insurer and agent, not to protect the agent from its joint venturer, the insurer. Allowing such an independent cause of action between agent and insurer injects uncertainty and an adversarial element into the insurer/agent relationship, which can only interfere with the efficient marketing and provision of insurance to the public.

In addition to being contrary to sound policy, granting agents independent standing under the Insurance Code also is contrary to Texas law.

2. Under Texas law, an agent has no standing to sue an insurer for misrepresentations regarding insurance policies.

The Texas Insurance Code creates a cause of action for "any person" who has sustained damages as a result of another's violation of certain specific statutory prohibitions. Tex. Ins. Code art. 21.21 § 16(a). Though the term "person" is very broadly defined in section 2(a) of article 21.21, that definition, by itself, does not answer the question of standing. Instead, Texas courts also look to whether the person is an

insured or beneficiary under a policy of insurance to determine whether that person has standing to bring an independent cause of action under article 21.21. The only Texas court to address this point directly held that an insurance agent is not a "person" with standing under article 21.21 to sue the insurer for whom he sells insurance. Under Texas law, therefore, Casteel lacks standing to sue Crown Life under article 21.21, section 16(a) of the Texas Insurance Code.

The court of appeals essentially held that anyone who comes within the broad definition of "person," has article 21.21 standing. That contention is contrary to Texas law. Texas courts determining whether a party has standing under article 21.21 look beyond the strict definition of "person," and analyze instead the status of the claimant and the nature of the cause of action. See, Shelton Ins. Agency v. St. Paul Mercury Ins. Co., 848 S.W.2d 739, 744 (Tex. App.—Corpus Christi 1993, writ denied); CNA Ins. Co. v. Scheffey, 828 S.W.2d 785, 791 (Tex. App.—Texarkana 1992, writ denied); Chaffin v. Transamerica Ins. Co., 731 S.W.2d 728, 731 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); Pineda v. PMI Mortgage Ins. Co., 843 S.W.2d 660, 672-73 (Tex. App.—Corpus Christi 1992), writ denied per curiam, 851 S.W.2d 191 (Tex. 1993). Texas courts have rejected such a "blinders-on" approach to determining article 21.21 standing, which starts and ends with the definition of "person," and instead give a meaningful and substantive analysis of the parties and claims.

The Chaffin court rejected that contention most directly. The court stated that the plaintiff's "claim that [article 21.21.] section 16 provides a remedy for "any person" injured by the conduct of one in the insurance business, without regard to that "person's"

relationship to the insurer, is negated by Texas authority." Chaffin, 731 S.W.2d at 731 (court's emphasis). The court then held: "we find no authority for extending the construction of "person" beyond one who is either an insured or a beneficiary of the policy." Id.

The Chaffin court then went on to cite numerous Texas cases in which insureds and beneficiaries were held to have standing to sue insurers, and others were not. See, Chaffin, 731 S.W.2d at 731-32. In conclusion, the court held that, "although [the plaintiff's] construction of the term "person" appears on its face to lend credence to their position, the weight of authority belies such an interpretation of the terms. We hold that appellants have no cause of action under the Texas Insurance Code." Chaffin, 731 S.W.2d at 791 ("There is no authority for the meaning of the term "person," as found in Article 21.21, to be extended beyond or who is either a insured or an intended beneficiary of the policy."); Pineda, 843 S.W.2d at 673 (court found "no authority for extending the construction of a "person" beyond one who is either an insured or a beneficiary of the policy."). See, also, Maccabees Mutual Life Ins. Co. v. McNeil, 836 S.W 2d 229, 233-34 (Tex. App.—Dallas 1992, no writ) (holding that named beneficiary under policy does have art. 21.21 standing).

This Court has also recently looked beyond the plain language of "person" to deny a third party standing to sue an insurer under article 21.21. Allstate Ins. Co. v. Watson, 876 S.W.2d 145, 150 (Tex. 1994). This Court denied the third party, who was neither an insured nor a beneficiary of a policy, standing to sue the insurer for unfair settlement practices, despite the fact that "article 21.21, section 16 is worded as providing a cause of

action to 'any person.'" Watson, 876 S.W.2d at 149. This Court's holding in Watson therefore made clear that the purpose of the statute -- not merely its plain language -- determines standing. In short, the Watson Court made clear that not every person is a "person" for purposes of art. 21.21.

Recent commentators on Watson – Supreme Court justices and other experts in the area of consumer law – agree that the Court's holding on article 21.21 standing is sweeping in scope. The Watson opinion's author described the Watson holding this way: "the extra-contractual obligations, rights, and remedies of article 21.21, section 16 do not extend to third-party claimants." Hon. Craig Enoch, "Supreme Court Update," 4th Annual Ultimate Insurance Seminar Program, at p. 2 (February 1995). One commentator and author on consumer law stated: "The [Watson] court held that the third party could not sue as a "person" under article 21.21, nor as a common law plaintiff under the duty of good faith and fair dealing." Joe K. Longley, "Handling an Insurance Bad Faith Case After Watson and Moriel," 4th Annual Ultimate Insurance Seminar Program, at p. 6 (February 1995).

This Court very recently interpreted the definition of "person" in the Insurance Code, to determine whether an employee/agent may be liable under art. 21.21 for misrepresentations regarding policies. Liberty Mutual Ins. Co. v. Garrison Contractors, Inc., 1998 WL 170079 (Tex. Apr. 14, 1998). In Garrison this Court held that an employee/agent of an insurer is a "person" who may be sued under art. 21.21 § 16(a) for deceptive practices in the business of insurance. That specific holding is not relevant

here, where the issue is standing to sue as a plaintiff, not potential liability as a defendant. Garrison is instructive here, however, because this Court continued its practice, embodied in Watson, of looking beyond the plain language of the definition in order to advance the statute's purpose. If "person" means "any person," then Garrison would have been an open and shut case, because the employee/agent was without doubt a person. This Court did not apply such facile reasoning, however, but instead analyzed the legislative history of the definition, the Department of Insurance regulations promulgated to implement that section, and the practical effect of a narrow v. broad reading of the definition before determining that the employee/agent is a "person" for purposes of art. 21.21. Garrison confirms that not every person is a "person" for purposes of art. 21.21.

The Fifth Circuit, interpreting Texas law, has also rejected the contention that the plain definition of "person" determines standing, and held that parties who are not insureds or beneficiaries have no standing to sue insurers under article 21.21. Warfield v. Fidelity and Deposit Co., 904 F.2d 322, 326-27 (5th Cir. 1990) (Texas law) (denying standing to shareholders and directors of insured); In Re Burzynski, 989 F.2d 733, 740-41 (5th Cir. 1993) (Texas law) (denying standing to physician seeking payment of insurance proceeds for treating insureds). The Warfield court described the standing analysis this way:

> The appellants argue that any person means every person and since they have been injured by an insurer who engaged in an act prohibited by art. 21.21, they are entitled to bring a claim against Fidelity. The broad reading of the statute urged by the appellants is precluded by precedent and by logic.

Warfield, 904 F.2d at 326 (emphasis added). The Burzynski court had a similar view:

> This is one of those cases in which the apparent plain meaning of the statute provides little guide to its meaning. Despite this broad statutory language which seems to give standing to 'any person,' under the proper interpretation, Burzynski and BRI do not have standing to bring an action under Insurance Code Art. 21.21. The Texas courts have severely limited standing to sue under this provision.

Burzynski, 989 F.2d at 740 (emphasis added).

The only Texas case directly on point held specifically that an insurance agent does not have standing to sue the insurer under article 21.21. Shelton, 848 S.W.2d at 744. The court made this unambiguous holding denying the agent standing:

> No authority exists to extend the meaning of the term "person," as found in art. 21.21, beyond one who was either an insured or an intended beneficiary of the policy. In this case, Shelton Agency was neither an insured nor an intended beneficiary of the policy. We therefore hold that Shelton Agency does not have a cause of action under art. 21.21 of the Texas Insurance Code.

Shelton, 848 S.W.2d at 744.

One former justice of this Court, commenting on Shelton, agreed that an insurance agent has no standing to sue the insurer under either the Insurance Code or the DTPA: "Insurance agent has no 'consumer' or 'person' standing under the DTPA or the Insurance Code, respectively, to bring a claim against an insurer for losses the agent suffered because of the insurer's mishandling of a claim under a policy the agent sold." Hon. John Cornyn, "Recent Developments/DTPA," State Bar of Texas 7th Annual DTPA Consumer Insurance Law Course, at p. A-11 (May 1994).

Texas law has long interpreted art. 21.21 standing narrowly to exclude parties who are not insureds or third party beneficiaries under policies. Such interpretation reflects a rejection of blinders-on, plain meaning interpretation of the statute in favor of protecting insureds and parties who acquire policies or policy benefits. This Court should continue that interpretation and hold that agents have no independent standing under art. 21.21 to sue insurers for representations regarding policies the agent did not purchase but sold to others.

B. CASTEEL HAS NO STANDING UNDER THE DTPA

1. Introduction

In addition to his Insurance Code allegations, Casteel asserted a cause of action against Crown Life under the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code § 17.41 et seq. (Vernon 1986 and Supp. 1996) (the "DTPA") for breach of certain DTPA "laundry list" items. The court of appeals affirmed the trial court's take-nothing judgment on those claims, because an agent is not a "consumer" under the DTPA. Even if an agent's DTPA claims are purely derivative through the Insurance Code, he has no standing to assert them because he lacks "consumer" status.

2. An agent is not a DTPA "consumer," and has no standing to pursue his derivative suit under this Court's holding in Faircloth.

A plaintiff under the DTPA must be a "consumer." A "consumer" is defined as one who "seeks or acquires by purchase or lease, any goods or services." Tex. Bus. & Com. Code § 17.45(4). Under Texas law, an agent is not a "consumer." See, Shelton, 848 S.W.2d at 744 (holding that insurance agent is not a consumer and therefore has no

standing to sue insurer under DTPA); Johnson v. Walker, 824 S.W.2d 184, 187 (Tex. App.—Fort Worth 1991, no writ) (holding that insurance agent is not consumer with DTPA standing).

The Insurance Code gives a "person" a derivative cause of action, under certain circumstances, for violations of section 17.46 of the DTPA. Tex. Ins. Code art. 21.21, § 16(a). This Court recently held that even a plaintiff relying on that joint authority for standing must still be a "consumer." Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 273-74 (Tex. 1995). The Faircloth Court held specifically that a plaintiff relying upon Insurance Code standing must be a "consumer" to complain of violations of DTPA section 17.46(b)(23), one of the specific laundry list sections Casteel alleged and the trial court submitted to the jury. Faircloth, 898 S.W.2d at 273-74. The Court reasoned that section 17.46(b)(23) specifically included the terms "consumer" and "goods and services," so the statute requires consumer status. Id.

One court construing Faircloth held that a plaintiff relying on Insurance Code standing to allege a DTPA violation must have consumer status only if the particular laundry list violation alleged includes the terms "consumer" or "goods or services." Webb v. International Trucking Co., Inc., 909 S.W.2d 220, 227-228 (Tex. App.—San Antonio 1995, no writ). Four of the five laundry list violations that Casteel alleged, and that the trial court submitted to the jury, include either the terms "consumer" or "goods or services." One alleged violation, however, did not include those terms. ACLI suggests that a fair reading of Faircloth would require consumer status in all cases brought under

the joint authority of the Insurance Code and the DTPA. Any narrower construction would elevate form over substance, place determinations of standing on the creativity of plaintiffs in pleading one laundry list violation rather than another, and leave Faircloth toothless.

CONCLUSION

Texas law does not give agents standing to pursue independent statutory causes of action against the insurers for whom they sell policies. Article 21.21 and the DTPA seek to protect insureds and consumers from unfair practices, not to protect agents from the insurers they represent. Standing to sue under those statutes, therefore, is limited in scope. ACLI would urge this Court to hold that an agent has no standing to pursue an independent statutory cause of action against the insurer.

WHEREFORE, PREMISES CONSIDERED, Amicus Curiae American Council of Life Insurance prays that this court find that an insurance agent has no standing to sue an insured for misrepresentations regarding policies under either the Texas Insurance Code or the DTPA.

Respectfully submitted,

SCOTT, DOUGLASS & McCONNICO, L.L.P.
600 Congress Avenue, Suite 1500
Austin, Texas 78701-2589
(512) 495-6300
(512) 474-0731 Fax

By _____
Steve McConnico
State Bar No. 13450300
Jane M. N. Webre
State Bar No. 21050060

ATTORNEYS FOR AMICUS CURIAE
AMERICAN COUNCIL OF LIFE
INSURANCE

Of Counsel:

Phillip E. Stano
American Council of Life Insurance
1001 Pennsylvania Ave., N.W.
Fifth Floor
Washington, D.C. 20004-2599
202-624-2183
202-624-2319 Fax

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Curiae Brief of the American Council of Life Insurance has been served on all counsel of record, as listed below, by Hand Delivery on April 24, 1998:

Gary F. DeShazo
Gary F. DeShazo & Associates
The Norwood Tower
114 W. 7th St., Suite 1200
Austin, Texas 78701

Terry Scarborough
Hance, Scarborough, Woodward & Weisbart
111 Congress Ave., Suite 800
Austin, Texas 78701

Alan Waldrop
Liddell, Sapp, Zivley, Hill & LaBoon
700 Lavaca, Suite 800
Austin, Texas 78701

Jane Webre

189922