













- Home 
- Areas of Practice 
- Joe K. Longley 
- Legal Publications 
- Class Counsel 
- Reported Cases 
- News and Press 
- Article 21.21 & DTPA 
- Links 
- Contact 

HISTORY OF ARTICLE 21.21 AND DECEPTIVE TRADE PRACTICES ACT

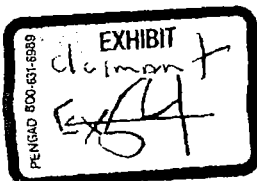
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I. General Considerations

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.

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 unconvincing 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.

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 branch 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.

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 legitimate 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]

lib
construction

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 in 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 (the twelve with private remedies appearing in boldface) 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]. The 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 than 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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