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I. *Crown Life v. Casteel*, Standing To Sue under Article 21.21, and Proper Jury Submission of DTPA-based Article 21.21 Claims

A. Overview of *Crown Life*</DIR

Crown Life Insurance Company v. Casteel, 43 Tex. Sup. Ct. J. 348 (Jan. 29, 2000), involved the claims of an independent insurance agent against the insurance company for whom he wrote "vanishing" life insurance policies. The agent (Casteel) alleged the insurer (Crown) misrepresented that policy premiums would vanish over the life of the policies and he passed this misinformation on to his clients. When he was sued by former clients (the Fergusons), Casteel cross-claimed against Crown alleging violations of Article 21.21 and included claims based on incorporated DTPA provisions. [1] Casteel also brought common-law claims for negligence, gross negligence, breach of

fiduciary duty, breach of a duty of good faith and fair dealing, fraud and constructive fraud. *Id*. at 348. Crown secured partial summary judgment on the common-law claims, but Casteel's Article 21.21 claims, including those based on the DTPA, proceeded to trial along with the Fergusons' claims. *Id*. at 348-49.

The jury found that both Crown and Casteel had engaged in unfair or deceptive acts or practices that were a producing cause of damage to Plaintiffs. Crown was 99% responsible and Casteel (who did not act "knowingly") was only 1% responsible. The jury also found Crown had knowingly engaged in false, misleading, and deceptive acts that were a producing cause of $7.5 million in damages to Casteel. *Id* at 349.

B. Trial court holds Casteel not a "person" under Article 21.21; court of appeals disagrees.

Following trial, Crown and the Fergusons settled and the Fergusons assigned their rights against Casteel to Crown. Crown moved for judgment notwithstanding the verdict on Casteel's claims and the trial court rendered a take-nothing judgment holding Casteel was neither a person as defined by Article 21.21, nor a consumer under the DTPA, and therefore lacked standing to bring suit under those statutes. The trial court also held Casteel was individually liable for Plaintiffs' actual damages, attorney's fees, and prejudgment interest in the amount of $1,366,983. *Id.* at 349.

The court of appeals disagreed and held Casteel was a "person" with standing to sue Crown under Article 21.21, but found he did not have standing to sue under incorporated provisions of the DTPA because he was not a "consumer." *Id.* The court of appeals also affirmed the judgment of $1,400,000 for Casteel's lost past and future income, but reversed $6,100,000 in mental anguish damages because there was legally insufficient evidence. Additionally, the court affirmed summary judgment on Casteel's common law claims. *Id.*

C. Texas Supreme Court's Holding in *Crown Life v. Casteel*

1. Casteel was a "person" under Article 21.21.

On motions for rehearing, the Texas Supreme Court held:

1. Casteel was a "person" with standing to sue Crown for violations of Article 21.21 of the Insurance Code, but he did not have standing to sue Crown for violations of DTPA provisions incorporated within Article 21.21 that, by their terms, required Casteel to be a consumer, including DTPA sections 17.46(b)(5), (7), (9), and (23);

2. inclusion of four invalid theories in a single broad-form liability question was harmful error requiring a new trial; and

3. Crown was entitled to summary judgment on Casteel's common law claims. 43 Tex. Sup. Ct. J. at 357.

In finding that Casteel was a "person" within the meaning of Article 21.21 § 2(a), the Texas Supreme Court reiterated *Liberty Mutual Insurance Co. v. Garrison Contractors, Inc*., 966 S.W.2d 482 (Tex. 1998). 43 Tex. Sup. Ct. J. at 351 (because "an employee-agent of an insurance company is a 'person' under Article 21.21, section 2(a), the agent may be sued for deceptive acts or practices, despite acting within the scope of employment"). Since Casteel was a "person" as defined by Article 21.21, Crown could be liable for misrepresentations and misinformation he unwittingly passed on to consumers.

2. Casteel was not a "consumer" and so had no standing to assert Article 21.21 incorporated-DTPA claims under subsections 17.46(b)(5), (7), (9), and (23).

   Although deemed a "person" within Article 21.21, Casteel had no standing to assert incorporated DTPA claims because he was not a "consumer." Consumer status is required to state a cause of action under Article 21.21 for the violation of a DTPA subsection "if the subsection either (1) specifically involves a consumer transaction, or (2) involves the misrepresentations of "goods or services" acquired by the plaintiff." 43 Tex. Sup. Ct. J. at 352. Accordingly, Article 21.21 claims for violations of DTPA sections 17.46(b)(5), (7), (9) require consumer status because they deal with misrepresentations of "goods and services," while section 17.46(b)(23) requires consumer status because it explicitly arises out of a "consumer" transaction and because it creates a cause of action for the failure to disclose information concerning "goods or services." 43 Tex. Sup. Ct. J. at 352-53.

3. Casteel did not need "consumer" status to assert an Article 21.21 incorporated-DTPA claim under 17.46(b)(12)

   Lack of consumer status, however, did not bar Casteel from bringing a cause of action under Article 21.21 for Crown's violation of DTPA section 17.46(b)(12), which makes it a violation to "represent[ ] that an agreement confers or involves rights, remedies, or obligations, which it does not have or involve, or which are prohibited by law." *Id.* at 353. When brought as a claim under Article 21.21, this subsection does not require consumer status because it neither arises out of a consumer transaction explicitly, nor deals with the misrepresentation of "goods or services." *Id.* (citing *Webb v. International Trucking Co*., 909 S.W.2d 220, 227 (Tex. App.--San Antonio 1995, no writ).

4. Erroneous submission of DTPA-based Article 21.21 claims was "harmful."

   Crown also challenged the court of appeals' conclusion that the erroneous submission of Casteel's DTPA-based Article 21.21 claims was "harmless." The trial court submitted a single broad-form question on the

issue of Crown's liability to Casteel. The question instructed the jury on thirteen independent grounds for liability, the first five of which were taken from the DTPA section 17.46(b) laundry list. The question requested a single answer on Crown's liability, which the jury answered affirmatively. 43 Tex. Sup. Ct. J. at 353. Casteel argued Crown waived any defect in the liability question by objecting generally that Casteel was not a "consumer" rather than specifically objecting to each subsection.

The Texas Supreme Court agreed with Crown and held that "[w]hen a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is *harmful* when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." *Id.* at 355 (emphasis added). In so finding, the court emphasized that Rule 277 of the Texas Rules of Civil Procedure, which requires broad-form submission "whenever feasible," is not an absolute. *Id*. Rule 277 implicitly requires that the jury be able to base its verdict on legally valid questions and instructions and it may not always be feasible to submit a single broad-form liability question that incorporates wholly separate theories of liability. *Id.*

II. Insurer's Attorney Acting as an "Investigator" in the Course of an Arson Claim Not Protected by the Attorney-Client Privilege?

The Texas Supreme Court recently denied a petition for writ of mandamus in an arson case, *In re Texas Farmers Insurance Exchange*, 43 Tex. Sup. Ct. J. 338 (Jan. 29, 2000). The insureds, who sat for examinations under oath ("EUO") and subsequently had their fire claim denied on suspicion of arson, attempted to take the deposition of the insurer's attorney who had conducted their EUO. The insureds also demanded that the insurer's attorney produce all documents relating to their fire claim and lawsuit. The insurer moved to quash the deposition and requested a protective order. The trial court denied the insurer's motion holding the insurer's attorney "was acting as an investigator, not as an attorney," and finding that the insurer failed to present sufficient evidence to support the privilege. 990 S.W.2d at 339. The court of appeals ruled in favor of the insureds[(2)] and the Texas Supreme Court refused to hear the subsequent mandamus action. Justice Hecht, joined by Justice Owen, filed a dissent from the denial of the petition for writ of mandamus.

Justice Hecht expressed amazement that the court declined to hear the mandamus action. "In no situation," he observed, "should an attorney be required to reveal his communications with his client about a factual investigation." 43 Tex. Sup. Ct. J. at 366. Justice Hecht criticized the appellate court's "anti-insurer" rationale for its decision,[(3)] and the potentially far-reaching effects of the decision. *Id*. ("The rule the court of appeals has adopted affects not only every lawyer retained to take an EUO, but every plaintiffs' lawyer who investigates a client's claims, and every attorney retained to investigate the internal affairs of a corporation or other group . . . .") *Id.* If Justice Hecht is correct that this case reflects a "startling" incursion into the protections of the attorney-client

privilege,[(4)] we are likely to see discovery battles and significant future litigation of this issue.

III. *McCarthy* on General Contractors as "Additional Insureds" in CGL Policies and Denial of Attorney's Fees in Declaratory Actions

A. General Contractor Was an "Additional Insured" on Subcontractor's CGL Insurance Policy.

In *McCarthy Brothers Co. v. Continental Lloyds Ins. Co.*, 7 S.W.3d 725 (Tex. App.--Austin 1999, no pet.) the Austin Court of Appeals reversed a summary judgment in favor of an insurer and held that because an injury to a subcontractor's employee arose out of the subcontractor's work for a general contractor, the general contractor was an "additional insured" on the subcontractor's CGL policy. The policy indicated the general contractor was an "additional insured" only with respect to "liability arising out of" the subcontractor's work for the general contractor. The injured electrician had fallen from a muddy sixty foot incline at a construction site. 7 S.W.3d at 727. The insurer argued liability arose out of the general contractor's own negligence, and not the negligence of the subcontractor, because the incline was unreasonably dangerous and the general contractor knew or should have known of that condition.

The Austin Court of Appeals found that although the phrase "arising out of" is broader than the concept of proximate causation in tort law, there must be more than a mere locational relationship between the injury and the site. *Id.* at 729-30. Because the injured worker was carrying out a necessary part of his job for the subcontractor, the court found a causal connection between his injury and the subcontractor's performance of its work for the general contractor. *Id.* at 730.

B. Trial Court Had Discretion to Deny Attorney's Fees to Both Parties in a Declaratory Action

The Austin Court of Appeals also assessed the district court's denial of attorney's fees under the declaratory judgment statute, Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (West. 1997). Entitlement to attorney's fees in a declaratory action is "discretionary" with the trial court and will not be reversed without a showing of an "abuse of discretion." Reversal for abuse of discretion is justified only when the trial court's decision was "arbitrary and unreasonable." 7 S.W.3d at 731. The court of appeals stated the trial court may have felt that both insured and insurer had legitimate rights to pursue and both should thus bear their own attorney's fees; the court thus concluded the trial court did not act arbitrarily and unreasonably in ruling that each party was responsible for its own attorney's fees.

Notes

1. Casteel alleged incorporated-DTPA violations against Crown and his jury question on Article 21.21 tracked the language of those DTPA subsections as follows: 17.46(b)(5) ("representing that the insurance policies had characteristics, uses, benefits, and quantities which they did not have"); 17.46(b)(7) ("representing that the insurance

policies were of a particular standard, quality or grade if they were of another"); 17.46(b)(9) ("advertising insurance policies with intent not to sell them as advertised"); 17.46(b)(12) ("representing the agreements conferred or involved rights, remedies or obligations which they did not have or involve"); and 17.46(b)(23) ("failing to disclose information concerning an insurance policy which was known at the time of the transaction with the intention to induce another transaction").

2. 990 S.W.2d 337.

3. The court of appeals had emphasized that if the attorney-client privilege operated as a "blanket privilege" covering all communications between the attorney conducting the EUO and the insurer, then insurance companies "could simply hire attorneys as investigators at the beginning of a claim investigation and claim privilege as to all the information gathered." 990 S.W.2d at 341.

4. The court of appeals specifically held the "attorney-client" privilege "would not apply to . . . communications [from an attorney to a client] concerning bare facts . . . ." 990 S.W.2d at 341.