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Statutory Claims for Unfair Insurance Settlement Practices - Vail v. Texas Farm Bureau Mutual Insurance Company.

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STATUTORY CLAIMS FOR UNFAIR INSURANCE SETTLEMENT PRACTICES—*VAIL V. TEXAS FARM BUREAU MUTUAL INSURANCE COMPANY*

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I. INTRODUCTION

Unfair and abusive insurance settlement practices are the subject of a number of recent Texas Supreme Court opinions.[1] Beginning with the January, 1987 decision in *Arnold v. National County Mutual Fire Insurance Company*,[2] and concluding with the May, 1988 decision in *Vail v. Texas Farm Bureau Mutual Insurance Company*,[3] the Texas Supreme Court has fashioned a common-law tort remedy for an insured who has been damaged as a result of a breach of the duty of good faith and fair dealing by an insurer,[4] and has construed the Texas Deceptive Trade Practices Act[5] (DTPA) and article 21.21 of the Texas Insurance Code (article 21.21) as providing a statutory remedy for unfair claims settlement practices by an insurer.[6] Between these dates, the Texas Supreme Court also examined instances of an insurer's liability under article 21.21[7] and permitted a worker's compensation claimant to recover against the compensation carrier for its breach of the duty of good faith and fair dealing in addition to the remedies provided by the worker's compensation statutes.[8]

While these cases demonstrate a broad range of activity in the area

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1. *See, e.g.*, Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129 (Tex. 1988)(award of treble damages to insured proper); Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210 (Tex. 1988)(tort action against worker's compensation carriers permitted); Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641 (Tex. 1987)(insured denied exemplary damages); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987)(breach of insurer's duty of good faith and fair dealing stated); Aetna Casualty & Sur. Co. v. Marshall, 724 S.W.2d 770 (Tex. 1987)(worker not limited to remedy under Worker's Compensation Act).

2. 725 S.W.2d 165 (Tex. 1987).

3. 754 S.W.2d 129 (Tex. 1988).

4. *Arnold*, 725 S.W.2d at 167. The court held

> "[a] cause of action for breach of the duty of good faith and fair dealing is stated when it is alleged that there is no reasonable basis for denial of a claim or delay in payment or a failure on the part of the insurer to determine whether there is any reasonable basis for the denial or delay."

Id. Exemplary and mental anguish damages are recoverable for a breach of the duty of good faith and fair dealing. *See id.* at 168.

5. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (Vernon 1987).

6. *See Vail*, 754 S.W.2d at 136 (court discusses statutory remedy for unfair claim settlement).

7. Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 643 (Tex. 1987)(insurer liability discussed in regard to article 21.21).

8. Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 214 (Tex. 1988)(Worker's Compensation Act's remedies not exclusive).

of insurer liability, this article will examine only the statutory claims against an insurer for its unfair and abusive claims settlement practices. An analysis of the common-law breach of the duty of good faith and fair dealing will remain for another day.

Statutory claims against insurers for unfair claims settlement practices are founded upon the DTPA and article 21.21. Both of these consumer protection statutes also involve the rules and regulations lawfully adopted by the State Board of Insurance of Texas and by the Texas Commissioner of Insurance as the chief executive and administrative officer of the board.[9] This analysis of statutory claims examines article 21.21, and identifies the persons who can be parties under the statute, the three causes of actions available under the statute, and the types of damages that can be recovered. Claims available to a "consumer" under the Deceptive Trade Practices Act will also be examined.

II. AN INSURER'S LIABILITY FOR UNFAIR CLAIMS SETTLEMENT PRACTICES

A. *The General Framework of Article 21.21 Claims*

The purpose of article 21.21 is to regulate trade practices in the business of insurance by defining, or providing for the determination of, all practices which constitute unfair methods of competition or unfair or deceptive acts or practices, and by prohibiting them.[10] The key to article 21.21 claims is found in section 16, which identifies who can bring an article 21.21 lawsuit and who can be sued. It also establishes the three causes of action available under the statute.[11]

Subsection (a) of section 16 provides that any "person" may maintain an action against any other person who engages in certain prohibited acts or practices.[12] "Person," as found in section 2 of article 21.21, is defined broadly to 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 insur-

9. *See* TEX. INS. CODE ANN. arts. 1.02, 21.21, § 16(a) (Vernon 1981 and Supp. 1988); TEX. BUS. & COM. CODE ANN. § 17.50 (a)(4) (Vernon 1987).

10. *See* TEX. INS. CODE ANN. art. 21.21, § 1 (Vernon 1981)(defining article 21.21's purpose).

11. TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon Supp. 1988).

12. *See id.*

ance counselors.[13] This definition includes individuals, entities and associations of individuals and entities and any other legal entity specifically includes persons and entities engaged in the business of insurance.[14] It is considerably broader in scope than the definition of a "consumer" under the Deceptive Trade Practices Act.[15] Thus, one has standing to bring an action under article 21.21 so long as one is a "person" as defined under section 2, regardless of whether one would have been a "consumer" under the DTPA.[16] Similarly, any "person" can be sued under article 21.21 when that person has engaged in the conduct prohibited by section 16.[17]

B. *Actionable Conduct*

There are three causes of action available to a person under article 21.21: one for a violation of section 4 of article 21.21;[18] a second for conduct declared in the rules or regulations adopted by the State Board of Insurance under article 21.21 to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance;[19] and finally for any practice defined by section 17.46 of the

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13. *See* TEX. INS. CODE ANN. article 21.21, § 2 (Vernon Supp. 1988).

14. *Id.*

15. *Id.* However, under the DTPA, a consumer is defined as an individual, partnership, corporation, the state of Texas, or any subdivision or agency of the state who seeks or acquires by purchase or lease, any goods or services, but does not include a business consumer (i.e., any person that seeks or acquires by purchase or lease goods or services for commercial or business use) which has assets of $25,000,000 or more or that is owned or controlled by a corporation or entity with assets of $25,000,000 or more. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).

16. *See* Aetna Casualty & Sur. Co. v. Marshall, 724 S.W.2d 770, 772 (Tex. 1987)(proof of "consumer" status not required to litigate article 21.21 claim)).

17. As originally enacted, section 16 provided that any person injured by another's unlawful conduct could maintain an action against the *company* or *companies* engaging in such conduct. Although the term "person" was defined in the Act, the term "company or companies" is not defined or otherwise identified. However, section 23 provided that judgments under the Act were to be paid only from the capital or surplus funds "of the offending insurance company." This led to contentions that only an insurance company could be sued under the Act. *See* Rainey-Mapes v. Queen Charters, Inc., 729 S.W.2d 907, 915 (Tex. App.—San Antonio 1987, writ dism'd)(defendant contended not liable for damages since not insurance company). Section 16 was amended in 1985, however, to provide that the aggrieved "person" may maintain an action against "the person or persons engaging in such acts or practices." Act of June 28, 1951, ch. 491, art. 21.21, 1951 Tex. Gen. Laws 868, 1075, *amended by* Act of April 4, 1985, ch. 22, § 3, 1985 Tex. Gen. Laws 395, 396.

18. TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon 1988)(section 4 defines unfair trade practices and section 16 makes violation of such practices actionable).

19. *Id.* (violation of regulations lawfully adopted by Insurance board actionable).

DTPA as an unlawful deceptive trade practice.[20]

1. Section 4 Violations

Section 4 of article 21.21 defines unfair methods of competition and unfair or deceptive acts or practices in conducting the business of insurance. Under this section there are eight specific types of misconduct defined, several of which deal with competition between insurance companies.[21] Generally, subsections (1) and (2) of section 4, dealing with misrepresentations, false advertising of policy contracts and false information in advertising generally, are the most likely bases for litigation by insureds.[22] Specifically, subsection (1) provides that it is an unfair method of competition and an unfair and deceptive act or practice in the business of insurance to make, issue, circulate or cause to be made, issued or circulated any statement misrepresenting the terms of any policy issued or the benefits promised thereby.[23] Under this definition, for example, it could be alleged that a denial of a claim where coverage in fact existed constitutes a misrepresentation of either the terms of the insurance policy or the benefits or advantages promised thereby. Similarly, a misstatement as to coverage is actionable as a misrepresentation under section 4(1).[24]

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20. *Id.*; *see also* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 132-33 (Tex. 1988)(court discusses causes of action under Insurance Code provision).

21. TEX. INS. CODE ANN. art. 21.21, § 4 (Vernon 1988)(defining different types of misconduct).

22. It has been held that an insured does not have a private cause of action based on a violation of section 4(5)(b), which prohibits the making of false entries in any book, report or statement of any insurer with intent to deceive an agent, examiner, or public official to whom such insurer is required by law to report. State Farm Fire & Casualty Co. v. Miller, 713 S.W.2d 700, 702 (Tex. App.—Dallas 1986, no writ). The specific holding in *Miller* was that no private cause of action exists under this subsection unless there was an injury resulting from a false entry made with the intent to deceive an agent, examiner, or public official. *Id.* at 702-03. The court concluded that since the subsection limits the misleading entries to those made with intent to deceive lawfully appointed agents, examiners or public officials, an insured does not fall within this protected class and, therefore, could show no injury. *Id.* at 703.

23. TEX. INS. CODE ANN. art. 21.21, § 4(1) (Vernon 1981); *see also Vail*, 754 S.W.2d at 133. In *Vail*, the plaintiff contended that the insurance company engaged in conduct in violation of the rules and regulations of the State Board of Insurance as well as engaging in and committing a deceptive trade practice under section 17.46 of the DTPA. *Id.* The court, therefore, did not address the dimensions of an unfair claim settlement practice case brought under section 4(1) of article 21.21. *See id.*

24. *See* Hope v. Allstate Ins. Co., 719 S.W.2d 634, 647-48 (Tex. App.—Fort Worth 1986, no writ). In *Hope*, the court upheld a trebled jury award, finding that an agent's statement that "we got you covered," when in fact increased coverage was not obtained, was a misrepresentation under section 4(1) of the terms of a policy issued or to be issued. *Id.*; *see also* Royal Globe

2. Rules and Regulations of the State Board of Insurance Dealing with Unfair or Deceptive Acts or Practices

The second cause of action under section 16 results from the commission of an act or practice declared in the rules and regulations lawfully adopted by the State Board of Insurance under article 21.21 to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance.[25] The board's authority to promulgate and enforce reasonable rules and regulations under article 21.21 is contained in section 13.[26] Two years prior to the enactment of section 16 in 1973, the State Board of Insurance Commissioners promulgated an order to regulate insurance trade practices in respect to advertising and solicitation. This order, known as rule 18663,[27] which is now codified in the Texas Administrative Code, has played a significant role in development of unfair claim settlement litigation, and provides in pertinent part as follows:

> Section 21.3. UNFAIR TRADE PRACTICES PROHIBITED.
> (a) Misrepresentation of insurance policies, unfair competition, and unfair practices by insurers, agents and other connected persons are prohibited by article 21.20 and article 21.21 or by other provisions of the Insurance Code and by these sections of the State Board of Insurance. No person shall engage in this State in any trade practice that is a misrepresentation of an insurance policy, that is an unfair method of competition, or that is an unfair or deceptive act or practice as defined by the provisions of the Insurance Code or as defined by these sections and other rules and regulations of the State Board of Insurance authorized by the Code.
> (b) Irrespective of the fact that the improper trade practice is not de-

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Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d 688, 694-95 (Tex. 1979)(misstatement of coverage actionable under DTPA and Insurance Code); Tidelands Life Ins. Co. v. Harris, 675 S.W.2d 224, 225 (Tex. App.—Corpus Christi 1984, no writ)(misrepresentation as to coverage actionable under DTPA and Insurance Code).

25. *See* TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon Supp. 1988).

26. *Id.* § 13 (Vernon 1981).

27. Order 18663 was later amended in Board Order 41060 of the State Board of Insurance. Both orders, as well as the other board orders and rules and regulations of the State Board of Insurance adopted under article 21.21, have been collected in 28 TEX. ADMIN. CODE § 21 (Hart Nov. 1, 1986). Since this area of the law is in the developmental stage, there continues to be citation to the various stages through which this board order has traveled, including Board Order 18663, 41060 and 28 TEX. ADMIN. CODE § 21.3. Due to the significance of the opinion in *Vail*, and its primary reference to the State Board of Insurance rule as Board Order 18663, this article will identify the rule as Board Order 18663; however, citations shall also be made to the Texas Administrative Code, which is the latest codification of the order.

> fined in any other section of these rules and regulations, no person shall engage in this State in any trade practice which is determined pursuant by law to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.
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> Section 21.4. Misrepresentation defined; Standards for Determining Misrepresentation. The terms misrepresentation, or the prohibited conduct, act, or practice that constitutes misrepresentation by a person subject to the provisions of these sections, is defined as any one of the following acts or omissions:
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> (1) any untrue statement of a material fact; or
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> (2) any omission to state a material fact necessary to make the statements made (considered in the light of the circumstances under which they are made) not misleading; or
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> (3) the making of any statement in such manner or order as to mislead a reasonably prudent person to a false conclusion of a material fact; or
>
> (4) any material misstatement of law; or
>
> (5) any failure to disclose any matter required by law to be disclosed, including failure to make disclosure in accordance with the provisions of these sections and other applicable rules of the State Board of Insurance.[28]

Although the State Board of Insurance has promulgated other rules pursuant to article 21.21,[29] Board Order 18663 has been the primary regulatory source for the development of statutory claims for unfair settlement practices. The key to unlocking the statutory claim for unfair settlement practices under Board Order 18663 is (a) the prohibition in section 21.3(a) against deceptive acts or practices *as defined by the provisions of the Insurance Code of Texas or as defined by other rules of insurance authorized by the Code*; and (b) the prohibition in section 21.3(b) against any person engaging in a trade practice determined pursuant by law to be a deceptive act or practice in the business of insurance.[30] Both of these subsections allow the use, through section 16 of article 21.21, of other provisions of the Insurance Code and other rules and regulations of the State Board of Insurance which define unfair or deceptive acts or practices.[31]

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28. Tex. State Bd. of Ins., 28 TEX. ADMIN. CODE §§ 21.3, 21.4 (Hart Nov. 1, 1986).

29. *See id.* §§ 21.115-21.116. These board orders deal principally with the advertisement of insurance policies and would clearly be applicable to any false advertising claim brought under section 16 of article 21.21. *See id.*

30. *See id.* § 21.3(a)(b) (emphasis added by author).

31. *Id.*

3. Deceptive Acts or Practices Under Section 17.46 of the DTPA

The third cause of action available to a person under section 16 of article 21.21 arises from the commission of any practice defined by section 17.46 of the DTPA as an unlawful deceptive trade practice.[32] Section 17.46 of the DTPA has two subsections. Subsection (a) is a broad prohibition against false, misleading or deceptive acts or practices in the conduct of any trade or commerce.[33] Subsection (b), commonly referred to as the "laundry list," contains twenty-four specific acts and practices defined as being included within the term "false, misleading or deceptive acts or practices."[34]

Section 16 of article 21.21 has been construed to allow a cause of action for a deceptive trade practice prohibited under both subsections of section 17.46.[35] Consequently, a "person" suing under section 16 is entitled to allege that the defendant engaged in either a laundry list violation of section 17.46(b) or that the defendant's conduct constituted a "false, misleading or deceptive act or practice" prohibited by section 17.46(a).[36] Thus, an action brought under section

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32. *See* TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon Supp. 1988)(incorporates DTPA causes of action).

33. *See* TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon 1987).

34. *See id.* § 17.46(b) (lists 24 specific deceptive trade practices).

35. *See, e.g.*, Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 135 (Tex. 1988)(Insurance Code's definition of unfair practice and who may recover incorporated into DTPA); Aetna Casualty & Sur. Co. v. Marshall, 724 S.W.2d 770, 772 (Tex. 1987)(Insurance Code article 21.21 section 16 does not require plaintiff to be consumer of goods and services under DTPA); Royal Globe Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d 688, 694-95 (Tex. 1979)(misrepresentation under Insurance Code article 21.21 constituted deceptive trade practice); Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 605 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)(private action conferred by insurer's handling of claim).

36. *See* Spradling v. Williams, 566 S.W.2d 561, 563 (Tex. 1978). There is a significant distinction in the way cases under section 17.46(a) and section 17.46(b) are submitted to the jury. This distinction centers on the burden of proving that the particular act or practice in question was false, misleading or deceptive. Since section 17.46(b) specifically states that the conduct set forth in the laundry list is false, misleading and deceptive, a "consumer" need not submit that question to the jury. The only issue, therefore, for a section 17.46(b) action under either the DTPA or section 16 of article 21.21 is whether or not the conduct occurred. *See id.* In submitting a section 17.46(a) case, however, it is necessary to submit two questions, one inquiring whether or not the act or practice occurred and, secondly, whether the act or practice was false, misleading or deceptive. *See id.* at 563-64; *see also* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 140 (Tex. 1988)(Phillips, C.J. dissenting)(dissent criticized majority's opinion for allowing recovery without submitting issues to occurrence of act and then to deceptiveness of act). When presenting a jury question as to whether particular conduct was false, misleading or deceptive under section 17.46(a), it is instructive that section

16 of the Texas Insurance Code which alleges a violation of section 17.46 of the DTPA can be maintained for any activity which is false, misleading or deceptive.[37] As discussed herein, a consumer suing under the DTPA for violations of section 17.46 is limited to the laundry list items in subsection (b) of section 17.46.[38]

C. *Article 21.21-2, Texas Insurance Code*

When the 1973 legislature expanded the provisions of article 21.21 by adding section 16, it also passed the Unfair Claim Settlement Practices Act, which became article 21.21-2.[39] The Unfair Claim Settlement Practices Act is separate and distinct from the provisions of article 21.21. It prohibits insurers doing business in Texas from engaging in unfair claim settlement practices, defined in section 2 of the Act as including the following types of conduct:

(a) Knowingly misrepresenting to claimants pertinent facts or policy provisions relating to coverage . . . ;

17.46(c)(1) of the DTPA authorizes the courts to construe subsection (a) by the interpretations given by the Federal Trade Commission and federal courts to section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), with regard to lawsuits brought by the Consumer Protection Division of the Texas Attorney General. Clearly those federal court and FTC interpretations would be equally persuasive with regard to a section 17.46(a) action maintained under section 16 of article 21.21. *See Spradling*, 566 S.W.2d at 565. The Texas Supreme Court, in determining what conduct constitutes unfair or deceptive acts or practices, noted the language of an old Second Circuit case: "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." *Id.* at 563 (quoting *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910)).

37. *See Vail*, 754 S.W.2d at 135 (section 17.46 violation for insurer's failure to effectuate settlement of claim actionable under section 16 of article 21.21); Aetna Casualty & Sur. Co. v. Marshall, 724 S.W.2d 770, 772 (Tex. 1987).

38. *See* TEX. BUS. & COM. CODE ANN. §§ 17.46(d), 17.50(a)(1) (Vernon 1987). Subsection (d) of section 17.46 serves to limit the term "false, misleading or deceptive acts or practices" to only the laundry list items for purposes of a "consumer's" cause of action brought under section 17.50. *Id.* § 17.46(d). Section 17.50(a)(1) creates a cause of action for a violation of the laundry list items set forth in section 17.46(b) when it is a producing cause of actual damages. *Id.* § 17.50(a)(1). Public enforcement of the Act is available under section 17.47(a) of the DTPA, which authorizes the Consumer Protection Division of the Texas Attorney General's Office to bring an action to restrain by temporary restraining order, temporary injunction, or permanent injunction any act or practice declared to be unlawful by the act. *Id.* § 17.47(a). Section 17.46(a) specifically makes the broad prohibition against false, misleading or deceptive acts or practices subject to an action by the Consumer Protection Division under section 17.47. *Id.* § 17.47.

39. *See* TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981)(law passed by 63rd legislature in 1973).

> (b) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims . . . ;
> (c) Failing to adopt and implement reasonable standards for prompt investigation of claims arising under its policies;
> (d) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear;
> (e) Compelling policy holders to institute suits to recover amounts due under policies by offering substantially less than the amounts ultimately recovered in suits . . . ;
> (f) Failure of any insurer to maintain a complete record of all the complaints which it has received during the preceding three years or since the date of its last examination by the commissioner of insurance, whichever time is shorter . . . ; or
> (g) Committing other actions which the State Board of Insurance has defined . . . as unfair claim settlement practices.[40]

The Act further provides for procedures, hearings, and the issuance of cease and desist orders and penalties by the State Board of Insurance.[41] Article 21.21-2 does not, by its terms, create a private cause of action for damages or penalties, and several Texas courts have construed article 21.21-2 as prohibiting any private remedies.[42] Most recently, in *Vail v. Texas Farm Bureau Mutual Insurance Company*,[43] the Texas Supreme Court recognized that article 21.21-2 does not confer a private cause of action.[44]

Even though article 21.21-2 does not provide for private relief, its definition of "*unfair claim settlement practices*" makes such settle-

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40. *Id.* art. 21.21-2, § 2(a)-(g).

41. *Id.* art. 21.21-2, §§ 4-6, 8.

42. *See* Cantu v. Western Fire & Casualty Ins. Co., 716 S.W.2d 737, 741 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.)(sanctions available but no private cause of action); Texas Farm Bureau Mut. Ins. Co. v. Vail, 695 S.W.2d 692, 695 (Tex. App.—Dallas 1985)(no right to sue under DTPA for violation of article 21.21-2), *rev'd on other grounds*, 754 S.W.2d 129 (Tex. 1988); State Farm Mut. Auto. Ins. Co. v. Clark, 694 S.W.2d 572, 575 (Tex. App.—Corpus Christi 1985, no writ)(cease and desist order as remedy); Lone Star Life Ins. Co. v. Griffin, 574 S.W.2d 576, 580 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.)(insured allowed only contractual recovery); Russell v. Hartford Casualty Ins. Co., 548 S.W.2d 737, 742 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.)(no private cause of action conferred); *see also* McKnight v. Ideal Mut. Ins. Co., 534 F. Supp. 362, 365 (N.D. Tex. 1982)(Texas law not intended to create new substantive rights).

43. 754 S.W.2d 129 (Tex. 1988).

44. *See Vail*, 754 S.W.2d at 134 (supreme court recognized article 21.21-2 conferred no private cause of action).

ment practices actionable *by incorporation* under article 21.21 and the DTPA.

III. INSURER'S LIABILITY FOR UNFAIR CLAIMS SETTLEMENT PRACTICES UNDER THE TEXAS DECEPTIVE TRADE PRACTICES ACT

There are four causes of action available to a "consumer" under the DTPA.[45] A consumer may sue for a violation of the laundry list items contained in section 17.46(b) of the Act;[46] for the breach of an express or implied warranty;[47] for any unconscionable action or course of action;[48] or for the use or employment by any person of an act or practice in violation of article 21.21, Texas Insurance Code, or the rules or regulations issued by the State Board of Insurance under article 21.21 of the Texas Insurance Code.[49]

As already observed, a plaintiff must qualify as a "consumer" under the definition stated in section 17.45(4) of the DTPA. The important limitation contained in this definition is that the plaintiff must have sought or acquired by purchase or lease goods or services.[50] Issuing a policy of insurance constitutes "services" under the DTPA.[51] As a result, post-sale conduct[52] as well as false statements or other misrepresentations as to the existence of coverage are actionable under the DTPA.[53]

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45. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1), (2), (3), (4) (Vernon 1987).

46. *Id.* § 17.50(a)(1) (provides cause of action for section 17.46(b) laundry list violation).

47. *Id.* § 17.50(a)(2) (provides DTPA cause of action for breach of any warranty).

48. *Id.* § 17.50 (a)(3).

49. *Id.* § 17.50 (a)(4).

50. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).

51. Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 603 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)(insured acquired services from insurer by purchasing policy); Sale v. Kennedy, 679 S.W.2d 733, 735 (Tex. App.—El Paso 1984)(sale of insurance service under DTPA), *rev'd on other grounds*, 689 S.W.2d 890 (Tex. 1985); Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 190 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(insurance policy considered service under DTPA); *see also* Kennedy v. Sale, 689 S.W.2d 890, 892 (Tex. 1985)(employee covered by group insurance consumer under DTPA); Royal Globe Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d 688, 694 (Tex. 1979)(insurer held liable for misrepresenting insurance policy).

52. *See* Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 541 (Tex. 1981)(DTPA designed to protect consumers for any deceptive trade practice not just sale); Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 603 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)(insured entitled to DTPA cause of action for misleading claims).

53. Aetna Casualty & Sur. Co. v. Marshall, 724 S.W.2d 770, 772 (Tex. 1987)(section 17.46 meant to cover misrepresentation of insurance coverage); Kennedy v. Sale, 689 S.W.2d

A thorough analysis of the causes of actions available to a consumer under the DTPA is beyond the scope of this article and is already available in other materials.[54] However, to appreciate an insurer's statutory liability for unfair claims settlement practices, it is necessary to briefly review the structure of the DTPA and its applicability to insurer misconduct.

Liability exists under any of the four available causes of action created by section 17.50(a) of the Act.[55] Thus, a violation of the laundry list items in section 17.46(b) occurs when, for example, an insurer misrepresents the extent of coverage or benefits available under a policy.[56]

A breach of an express warranty by an insurer is actionable under section 17.50(a)(2) of the Act.[57] Moreover, since insurance is a "service" under the DTPA, a failure to provide insurance, or the service attendant to insurance may constitute breach of an implied warranty. In this regard, the Texas Supreme Court has recognized an implied warranty exists that repair services provided to tangible goods or property will be performed in a good and workmanlike manner.[58] In recognizing the existence of this implied warranty, the court observed the shift in the American economy in the last thirty-five years from a "goods" to a "services-oriented" economy.[59] The court also emphasized that the need to protect Texas consumers required the utilization of implied warranties as a matter of public policy, given the

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890, 891-92 (Tex. 1985)(insurer held liable under DTPA for misrepresenting policy limits); Royal Globe Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d 688, 692-93 (Tex. 1979)(misrepresenting insurance by agent actionable under DTPA); Rainey-Mapes v. Queen Charters, Inc., 729 S.W.2d 907, 915 (Tex. App.—San Antonio 1987, writ dism'd)(entitled to treble damages where agent misrepresented extent of coverage under maritime policy).

54. *See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION (2d ed. 1983).

55. One who buys an insurance policy is a consumer of services under DTPA. Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 190 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ). Once consumer status is obtained, the consumer may maintain an action for violation of the "laundry list," for breach of warranty, for unconscionable action, or under the Insurance Code. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)-(4) (Vernon 1987).

56. Aetna Casualty & Sur. Co. v. Marshall, 724 S.W.2d 770, 772 (Tex. 1987).

57. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987)(breach of warranty actionable under DTPA).

58. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987)(implied warranty to repair in good and workmanlike manner available to consumers under DTPA).

59. *Id.* at 353.

significance of our service-oriented economy.[60] It seems plausible that the significance of insurance in today's economy, as well as the disparity in bargaining position as between insureds and insurers, similarly requires the protection of Texas consumers through the use of an implied warranty as to the services provided by insurance and insurance companies.[61]

An action against an insurer for its unconscionable acts is also available to a consumer under the DTPA, but does not appear to be available under article 21.21.[62] Thus, a "consumer" claiming that an insurance company took advantage of his lack of skills or abilities to a grossly unfair degree, or engaged in conduct that resulted in a gross disparity between the value received by the insurance company and the consideration paid by the consumer, can sue for damages under section 17.50(a)(3) of the DTPA.[63]

Finally, a remedy is available to a "consumer" under section 17.50(a)(4) of the DTPA for a violation of article 21.21 of the Insurance Code, as well as the rules and regulations promulgated thereun-

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60. *Id.* (interest in protecting consumer from inferior services paramount to damages imposed upon seller).

61. *Id.* (implied warranty created when public policy mandates); Davidow v. Inwood N. Professional Group, 747 S.W.2d 373, 376-77 (Tex. 1988)(due to public policy of consumer protection, implied warranty of habitability extended to commercial leases).

62. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon 1987). No specific remedy for an insurer's unconscionable conduct is provided under article 21.21 of the Texas Insurance Code. *See* TEX. INS. CODE ANN. art. 21.21, § 4 (Vernon Supp. 1989)(no similar cause of action). However, under section 17.50(a)(3) of the DTPA, a consumer may litigate an unconscionable course of action. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon 1987). Under section 17.45(5), unconscionable action or course of action is defined as follows:

> 'Unconscionable action or course of action' means or act or practice which, to a person's detriment:
>
> (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or
>
> (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

Id. § 17.45(5).

63. *Id.*; *see also* McGuire v. Texas Farmers Ins. Co., 727 S.W.2d 1, 7 (Tex. App.—Beaumont 1987), *rev'd*, 744 S.W.2d 601 (Tex. 1988). In *McGuire*, while the court of appeals determined that the adjuster's conduct was unconscionable under the DTPA, the supreme court reversed based upon its determination that the court of appeals had simply substituted its judgment in the place of the jury's. *McGuire*, 744 S.W.2d at 603. In *Chastain v. Koonce*, the Texas Supreme Court stated: ". . . a consumer need only prove that he was taken advantage of to a grossly unfair degree. This should be determined by examining the entire transaction and not by inquiring whether the defendant intended to take advantage of the consumer or acted with knowledge or conscious indifference." Chastain v. Koonce, 700 S.W.2d 579, 583 (Tex. 1985).

der.[64] Section 17.50(a)(4) has been interpreted as incorporating the authorization in article 21.21 for a mandatory recovery of twice the amount of actual damages under section 16 where the defendant's conduct is found to be knowing.[65]

Thus, a consumer may sue an insurer under the DTPA for any act listed in section 17.46(b); or the breach of an express or implied warranty; or for an unconscionable act.[66] If successful, the consumer may recover a discretionary award of additional damages not to exceed treble damages where the defendant's conduct was committed knowingly.[67] However, if the same "consumer" proves as part of his DTPA case a knowing violation of article 21.21, he is entitled to elect a mandatory recovery of actual damages plus twice the amount of actual damages under the incorporated provision of article 21.21.[68]

The statute of limitations under the DTPA, like article 21.21, is two years.[69] The limitation provision in both Acts commences upon the date on which the "deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading or deceptive act or practice."[70] Both statutes also require that the defendant be provided thirty days written notice of the "specific complaint and the amount of actual damages and expenses, including any attorney's fees reasonably incurred in asserting the claim."[71] The underlying "purpose of the notice requirement is to discourage litigation and encourage settlements of consumer complaints."[72] Under

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64. TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon 1987).

65. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 137 (Tex. 1988)(noting incorporation of article 21.21 in entirety). Section 16(b)(1) of article 21.21 has been amended to limit additional recovery to twice the actual damage amount if a knowing violation is found by the trier of fact since the action in *Vail* arose. TEX. INS. CODE ANN. art. 21.21, § 16(b)(1) (Vernon Supp. 1989).

66. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)-(4) (Vernon 1987).

67. *Id.* § 17.50(b)(1).

68. TEX. INS. CODE ANN. art. 21.21, § 16(b)(1) (Vernon Supp. 1989).

69. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987); *see also* TEX. INS. CODE ANN. art. 21.21, § 16(d) (Vernon Supp. 1989).

70. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987); *see also* TEX. INS. CODE ANN. art. 21.21, § 16(d) (Vernon Supp. 1989).

71. TEX. INS. CODE ANN. art. 21.21, § 16(e) (Vernon Supp. 1989); *see also* TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 1987).

72. Jim Walters Homes, Inc. v. Valencia, 690 S.W.2d 239, 242 (Tex. 1985); *see also* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 137 (Tex. 1988)(notice required to inform seller and provide opportunity for settlement).

this requirement, a letter sent by a consumer's attorney informing the defendant that a good or service was not received in the condition that it was represented, together with a claim for damages and attorney's fees is sufficient notice.[73] The giving of thirty days written notice is not required where it is impracticable because the suit must be filed in order to prevent the expiration of the statute of limitations.[74]

Both the DTPA and article 21.21 provide a defense to any defendant who tenders a settlement offer, including an agreement to reimburse attorney's fees, not later than thirty days after receipt of the statutory notice.[75] If the offer of settlement is not accepted, both statutes provide that the defendant may file the offer with the court, together with an affidavit certifying its rejection.[76] The filing of the rejected settlement offer with the court then becomes a defense to either discretionary additional damages under the DTPA or mandatory additional damages under the Insurance Code "if the court finds that the amount tendered in the settlement offer is the same or substantially the same as the actual damages found by the trier of fact."[77] In the event of such a finding, the successful plaintiff is entitled to recover the lesser of the settlement offer or actual damages found by the fact finder.[78] Both statutes also provide the defendant a counterclaim for court costs and attorney's fees for actions which are groundless and brought in bad faith or for the purpose of

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73. *See Vail*, 754 S.W.2d at 137 (letter and claim sufficient); *see also* North Am. Van Lines of Texas, Inc. v. Bauerle, 678 S.W.2d 229, 235 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.)(letter and attachments held sufficient). *But see* Hollingsworth Roofing Co. v. Morrison, 668 S.W.2d 872, 875 (Tex. App.—Fort Worth 1984, no writ)(notice not providing amount of actual damages insufficient). However, it should be noted that the general remedy for lack of proper notice is not dismissal, but abatement of the case until the proper notice requirement is satisfied. International Nickle Co. v. Trammel Crow Distrib. Corp., 803 F.2d 150, 156-57 (5th Cir. 1986).

74. TEX. BUS. & COM. CODE ANN. § 17.505(b) (Vernon 1987); TEX. INS. CODE ANN. art. 21.21, § 16(f) (Vernon Supp. 1989).

75. *Compare* TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon 1987)(DTPA's defense when offer is substantially same as claim) *with* TEX. INS. CODE ANN. art. 21.21, § 16(g) (Vernon Supp. 1989)(article 21.21's defense when offer substantially same as claim).

76. *Compare* TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon 1987)(procedure when offer not accepted) *with* TEX. INS. CODE ANN. art. 21.21, § 16(h) (Vernon Supp. 1989)(procedure when offer not accepted).

77. TEX. INS. CODE ANN. art. 21.21, § 16(h) (Vernon Supp. 1989); TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon 1987).

78. TEX. INS. CODE ANN. art. 21.21, § 16(h) (Vernon Supp. 1989); TEX. BUS. & COM. CODE ANN. § 17.505(d) (Vernon 1987).

harassment.[79]

It is against this background of the Texas Insurance Code and the DTPA that the *Vail v. Texas Farm Bureau Mutual Insurance* case is set.[80] From the opinion in *Vail*, we learn that there exist two statutory causes of action for unfair claim settlement practices.[81]

IV. *Vail v. Texas Farm Bureau Mutual Insurance Company*

In *Vail*, the Texas Supreme Court held that an insured has a cause of action under both the DTPA and article 21.21 of the Insurance Code for damages resulting from an insurer's unfair claim settlement practices.[82] In 1978, Melvin and Maryanne Vail purchased a fire insurance policy from Texas Farm Bureau Mutual County Insurance Company in the face amount of $25,000.00, with contents being insured for an additional $10,000.00.[83] On July 18, 1979, the Vails' house was destroyed by fire during the term of their fire insurance policy.[84] Upon filing their claim for benefits under the fire insurance

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79. TEX. INS. CODE ANN. art. 21.21, § 16(c) (Vernon 1988); TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 1987).

80. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129 (Tex. 1988).

81. *Vail*, 754 S.W.2d at 136 (one claim exists under section 17.50(a)(4) of DTPA and other arises under article 21.21 section 16 of Insurance Code).

82. *Id.* The court's opinion in *Vail* describes the insured's pleadings as alleging Texas Farm failed to exercise good faith in the processing of their claims. *Id.* at 135. The balance of the opinion speaks of the case as an action under the DTPA and article 21.21 for the insurer's "unfair claim settlement practices." *Id.* at 131-37. The opinion in *Vail*, as well as this article, deals only with the statutory causes of action under DTPA and article 21.21 for damages resulting from an insurer's unfair claim settlement practices. *Id.* These statutory actions are separate and distinct from the common-law tort for breach of the duty of good faith and fair dealing. *See* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167-68 (Tex. 1987)(court discusses common-law duty of good faith and fair dealing). As discussed below, however, an insurer's breach of the duty of good faith and fair dealing by failing to promptly and equitably process or pay an insured's claim can state a *statutory cause of action* for an unfair claim settlement practice under the DTPA and article 21.21, according to the court's rationale in *Vail*. *Vail*, 754 S.W.2d at 136.

83. *Vail*, 754 S.W.2d at 130. As reflected in the court of appeals' opinion, the fire insurance policy was a "valued policy." *Vail*, 695 S.W.2d at 692, 693 n.3 (Tex. App.—Dallas 1985), *rev'd*, 754 S.W.2d 129 (Tex. 1988). A valued policy is one in which the measure of value of the insured property is agreed to under the terms of the insurance contract so that, in the event of a total loss, the insured need not prove the actual value of the property. Houston Fire & Casualty Ins. Co. v. Nichols, 435 S.W.2d 140, 142 (Tex. 1968). Under article 6.13 of the Texas Insurance Code, all fire insurance policies are required to be valued policies. TEX. INS. CODE ANN. art. 6.13 (Vernon 1981). The statute does not apply, however, to insured personal property. *Id.*

84. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 130-31 (Tex. 1988).

policy, the Vails were initially told by their agent that Texas Farm would not "willingly" pay the claim because the Vails had not provided an adequate list of the personal property destroyed by the fire.[85] As noted by the court, however, the adequacy of the list of contents had absolutely no bearing on the insurer's duty to pay under the policy on the home itself.[86] Nevertheless, Texas Farm notified the Vails approximately one month after the fire that it was denying the claims for both the home and the personal property based upon the inadequacy of the contents list.[87] Texas Farm subsequently hired an engineering firm to investigate the fire for the possibility of arson.[88] This investigation revealed no evidence of arson.[89] Texas Farm, apparently still harboring doubts as to the cause of the fire, then proceeded to enlist the Texas Fire Marshall's office to conduct a second investigation.[90] The Fire Marshall, in testing samples of the fire debris, determined that one sample indicated no fire setting materials, while three others indicated the presence of incendiaries.[91] At trial, however, the Vails offered expert testimony challenging the conditions under which the Fire Marshall's tests were made and raising questions as to the validity of the test results.[92] Nevertheless, as a result of the Fire Marshall's report, Texas Farm notified the Vails that it was changing its basis for denying the claim from the inadequate contents list to arson.[93]

The Vails initially alleged that Texas Farm had engaged in conduct in violation of the DTPA and the Insurance Code, as well as breaching the common-law duty of good faith and fair dealing.[94] As a result of Texas Farm's special exceptions to the Vails' pleadings, the trial court struck "all of the DTPA and Insurance Code allegations" except for the following:

> In the alternative, Defendant violated the Tex. Bus. & Comm. [sic] Code, § 17.50(a)(4) by employing or using acts which violate art. 21.21

85. *Id.* at 131.
86. *Id.*
87. *Id.*
88. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 131 (Tex. 1988).
89. *Id.* The firm found no fire-setting materials present. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 131 (Tex. 1988).
94. *Id.*

> of the Texas Insurance Code, or rules and regulations issued by the State Board of Insurance under said art. 21.21, as follows:
> (b) By engaging in the practices contrary to Sec. 4 of Insurance Board Order 18663, Sec. (a), which acts were unfair or deceptive as defined by art. 21.21-2, Sec. 2(d) by not attempting in good faith to effectuate prompt, fair, and equitable settlements on claims submitted in which liability had become reasonably clear.[95]

On the basis of these statutory claims, as well as the allegation that Texas Farm breached the common-law duty of good faith and fair dealing, the jury found "that Texas Farm had intentionally failed to exercise good faith in the processing of the Vails' claim by refusing to settle the claim promptly, fairly, and equitably after Texas Farm's liability had become reasonably clear."[96] The trial court entered judgment granting the Vails a recovery of three times the full policy limit of $35,000.00, plus attorney's fees and prejudgment interest on the trebled amount.[97]

On appeal to the Dallas Court of Appeals, the court denied the Vails' statutory recoveries under both the DTPA and article 21.21.[98] The Dallas Court of Appeals reversed and rendered a judgment for $35,000.00, being the contract damages covered by the terms of the insurance policy, together with attorney's fees and prejudgment interest.[99] The Dallas Court of Appeals' opinion reasoned that the legislature intended to "seal off" unfair claim settlement lawsuits from being actionable under the DTPA.[100] The Dallas court further reasoned that State Board of Insurance Board Order No. 18663 did not give rise to a cause of action under the DTPA and that no private cause of action existed under article 21.21-2 of the Texas Insurance Code for an insurer's unfair claim settlement practices.[101] The opinion by the Dallas Court of Appeals ignored the Vails' claims under article 21.21 of the Texas Insurance Code.

The supreme court reversed the holding of the Dallas Court of Appeals, finding that the Vails adequately pled and proved a cause of

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95. *Id.*
96. *Id.*
97. *Id.*
98. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 131 (Tex. 1988).
99. *Id.*
100. Texas Farm Bureau Mut. Ins. Co. v. Vail, 695 S.W.2d 692, 695 (Tex. App.—Dallas 1985), *rev'd*, 754 S.W.2d 129 (Tex. 1988).
101. *Id.* at 694-95 (stating that only action is cease and desist order by State Board of Insurance).

action under both the DTPA and article 21.21.[102] The supreme court reinstated the trial court's judgment for treble the amount of the policy limits, totaling $105,000.00, as well as attorney's fees, but limited the application of prejudgment interest to the actual damages of $35,000.00, the insurance policy benefit.[103]

In three pages of text, the supreme court's opinion in *Vail* outlines the statutory claims for unfair claim settlement practices under the DTPA and article 21.21.[104] The court held that the violation of the rules and regulations promulgated by the State Board of Insurance gives rise to the first type of statutory action for unfair claim settlement practices.[105] The second statutory action results from any unfair claim settlement practices which are determined to be "false, misleading, or deceptive acts or practices" under section 17.46(a) of the DTPA.[106]

A. *Statutory Claims Under the Deceptive Trade Practices Act and Article 21.21 for Violations of State Board Rules*

1. State Board of Insurance Board Order 18663, Section 4(a)

The *Vail* opinion observed that section 16 of article 21.21 prohibits an insurer from engaging in conduct declared to be "unfair or deceptive by a rule or regulation of the State Board of Insurance."[107] The court then scrutinized Board Order 18663, which was specifically adopted pursuant to article 21.21.[108] The court observed that section 4(a) of the Board Order allows an insured to recover against an insurer for unfair or deceptive acts by proving that damages resulted from an unfair or deceptive practice as defined by the Insurance Code

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102. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 136 (Tex. 1988)(noting statutory remedies cumulative of other remedies).

103. *Id.* at 137 (no prejudgment interest on punitive damages).

104. *See id.* at 133-36 (detailing consequences of insurer's unfair practices).

105. *Id.* at 133 (Board Order 18663, section 4 permits recovery)(now 28 TEX. ADMIN. CODE § 21.3 (Hart Nov. 1, 1986)).

106. *Id.* at 135.

107. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 133 (Tex. 1988).

108. *Id.*; *see also* Texas Farm Bureau Mut. Ins. Co. v. Vail, 695 S.W.2d 692, 693-94 (Tex. App.—Dallas 1985)(lower court mistakenly observing that Board Order 18663 adopted under article 21.21-2), *rev'd*, 754 S.W.2d 129 (Tex. 1988). The supreme court's observation that the Board Order was adopted pursuant to Article 21.21 is critical to its ultimate holding, since a private action under Article 21.21, as well as under the DTPA, lies only for violations of the rules and regulations lawfully adopted by the State Board of Insurance under Article 21.21. *See Vail*, 754 S.W.2d at 135-36.

or by any other rules or regulations promulgated by the State Board of Insurance.[109] The court also observed that section 4(b) of the Board Order allows a recovery for damages produced by a practice "determined pursuant to law to be an unfair or deceptive practice" in the insurance business.[110] Consequently, two avenues for relief are provided in section 4 of Board Order 18663: (a) either an unfair or deceptive act which is defined by the Insurance Code or any other rules promulgated by the State Board of Insurance; or (b) a practice determined pursuant to law to be unfair or deceptive.[111]

With regard to the first category of claims, the Texas Supreme Court held that the definition of unfair claim settlement practices in article 21.21-2, the Unfair Claim Settlement Practices Act, falls within Board Order 18663.[112] Section 2 of article 21.21-2 provides that:

> . . . . [a]ny of the following acts by an insurer, if committed without cause and performed with such frequency as determined by the State Board of Insurance as provided for in this Act, shall constitute unfair claim settlement practices:
> . . . (d) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear;"[113]

In construing this statutory language, the court in *Vail* reasoned that the unfair practice defined in the statute need not meet the frequency requirement to be a basis for a private cause of action.[114] It determined that the frequent commission of such unfair acts by an insurer was only a statutory prerequisite to the issuance of cease and desist orders by the State Board of Insurance against insurers.[115] As a result, the court held that the unfair acts defined by section 2 of article

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109. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d, 129, 133 (Tex. 1988).

110. *Id.* (improper practice need not be defined in statute because court may determine itself).

111. *Id.*

112. *Id.* at 134.

113. TEX. INS. CODE ANN. art. 21.21-2, § 2 (Vernon 1981).

114. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 134 (Tex. 1988).

115. *Id.* This holding drew three dissents, expressed in two separate dissenting opinions. *Id.* at 137-41 (Gonzalez, J., and Phillips, C.J., dissenting). Justice Gonzalez argued that while "frequency" may not be a requisite of the actual act, nevertheless, frequency of the act is required by article 21.21-2 in order to elevate it to the status of an unfair claim settlement practice. *Id.* at 138-39 (Gonzalez, J., dissenting). Justice Phillips, joined by Justice Culver, dissented from the majority opinion. *Id.* at 139 (Phillips, J., dissenting).

21.21-2 are incorporated into section 4(a) of Board Order 18663; similarly, Board Order 18663 is incorporated into § 17.50(a)(4) of the DTPA and section 16 of article 21.21 of the Texas Insurance Code.[116] Since the Vails offered evidence and obtained favorable jury findings that Texas Farm did not attempt in good faith to effectuate a prompt, fair and equitable settlement when liability had become reasonably clear, a cause of action under both the DTPA and article 21.21 was stated and proved.[117]

The Vails also attempted to assert a cause of action under section 4(a) of Board Order 18663 by incorporating the definition of unfair claim settlement practices contained in Board Order 41454.[118] This Board Order provides in pertinent part that:

> No insurer shall engage in unfair claims settlement practices. Unfair claims settlement practices means committing or performing with such frequency as to indicate a general business practice any of the following: . . .(4) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear . . . (15) refusing to pay claims without conducting a reasonable investigation based upon all available information;[119]

The court observed that it had previously considered a similar argument in *Chitsey v. National Lloyds Insurance Company*,[120] and held that while an action did exist under Board Order 41454, proof of "frequency" is required.[121] In *Vail*, the court held that the insureds could not successfully rely on the definition provided by Board Order 41454 since Texas Farm's denial of only two claims, as a matter of law, did not constitute the "frequency" required by the definition in Board Order 41454.[122]

2. State Board of Insurance Board Order 18663, Section 4(b)

An alternative claim for relief exists under subsection 4(b) of Board Order 18663 where an insured suffers damages produced by an insurer's conduct which has been determined pursuant to law to be un-

116. *Id.*
117. *Id.* at 135-36.
118. *Id.* at 134-35.
119. Tex. State Bd. of Ins., 28 TEX. ADMIN. CODE § 21.203 (Hart Nov. 1, 1986).
120. 738 S.W.2d 641 (Tex. 1987).
121. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 134-35 (Tex. 1988).
122. *Id.* at 135.

fair or deceptive.[123] The court in *Vail* held that it is empowered to determine whether conduct constitutes an unfair or deceptive act and that actions by insurers determined to be unfair or deceptive in prior opinions are actionable under subsection 4(b) of Board Order 18663.[124] The court then found that its previous holdings in *Arnold v. National County Mutual Fire Insurance Company*[125] and *Aranda v. Insurance Company of North America*[126] were determinations pursuant to law that "an insurer's lack of good faith in processing a claim is an unfair or deceptive act."[127] The court therefore concluded that the Vails stated a cause of action for unfair claims settlement practices under both the DTPA and article 21.21 through the incorporation of subsection 4(b) of Board Order 18663, and the holdings in *Arnold* and *Aranda*.[128]

The supreme court's holding in *Arnold* recognized the common-law duty on the part of an insurer to act fairly and in good faith in bargaining for settlements and resolutions of claims with insureds. The holding in *Aranda* imposed the same duty upon worker's compensation carriers in dealing with injured employees. The supreme court's holding in *Vail* that these opinions constitute determinations of unfair or deceptive acts is simply a recognition that a breach of the tort duty to act fairly is the equivalent of acting in an unfair manner for purposes of article 21.21. The basis for this unfairness derives from the special relationship found to exist as between an insurer and insured in *Arnold*.[129] That relationship arises out of the parties' unequal bar-

123. Tex. State Bd. of Ins., 28 TEX. ADMIN. CODE § 21.3(b) (Hart Nov. 1, 1986).

124. *Vail*, 754 S.W.2d at 135.

125. 725 S.W.2d 165 (Tex. 1987).

126. 748 S.W.2d 210 (Tex. 1988).

127. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 135 (Tex. 1988).

128. *Id.* Justice Phillips dissented from the court's conclusion that the decisions in *Aranda* and *Arnold* amounted to prior determinations of a deceptive act or practice in the business of insurance. *Id.* at 140 (Phillips, C.J., dissenting). Justice Phillips noted that these two opinions determined the existence of the duty on the part of an insurer to deal fairly and in good faith with an insured, and that the duty exists between a worker's compensation carrier and an injured employee. *Id.* He argued that the holdings do not constitute determinations that such conduct constitutes a deceptive act or practice in the business of insurance for purposes of an action under subsection 4(b) of Board Order 18663. *Id.* This argument seems to ignore, however, the implicit fact that when an insurer is determined to have breached its duty to deal *fairly* with an insured, it has acted in an unfair manner. Therefore, the court's determination in *Arnold* and *Aranda* that such a duty exists logically requires the conclusion that a breach of the duty is equivalent to an unfair act or practice.

129. 725 S.W.2d 165, 167 (Tex. 1987).

gaining power and the nature of insurance contracts which might allow unscrupulous insurers to take advantage of their insured's misfortunes in bargaining for settlement or resolution of claims.[130] In evaluating the kinds of circumstances which create unfairness, the court in *Arnold* recognized the possibility that insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed.[131] It also observed that insurers occupy the unique position of having exclusive control over the evaluation, processing and denial of claims. Thus, a deviation from the type of conduct which would be engaged in by a person of ordinary care and prudence constitutes, under *Arnold*, a breach of the duty of good faith and fair dealing and is manifestly unfair.[132]

Based upon the Vails' pleading and proving that Texas Farm breached the duty of good faith and fair dealing in processing its claims, the court held that they stated a cause of action for violation of subsection 4(b) of Board Order 18663, which was actionable under section 17.50(a)(4) of the DTPA, as well as article 21.21, section 16, of the Texas Insurance Code.[133]

B. *Statutory Claims for Unfair Settlement Practices Under Section 17.46 of the Deceptive Trade Practices Act*

The *Vail* opinion also recognized a cause of action for unfair claim settlement practices by incorporating section 17.46 of the DTPA into article 21.21, which in turn is incorporated into section 17.50(a)(4) of the DTPA.[134] As already observed, section 16 of article 21.21 incorporates both subsections (a) and (b) of section 17.46 of the Deceptive Trade Practices Act. Subsection (a) prohibits false, misleading and

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130. *Id.*

131. *Id.*

132. *See id.*, 725 S.W.2d at 167; G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544, 548 (Tex. Comm'n App. 1929, holding approved).

133. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 135 (Tex. 1988). Justice Phillips objected to the court's holding with respect to Subsection 4(b) in that the Vails alleged only an action incorporating subsection 4(a) of Board Order 18663. *Id.* at 139-40 (Phillips, C.J. dissenting). Justice Phillips nevertheless recognizes that the court might in the future be confronted with a case in which it is called upon to determine whether a particular practice constitutes an unfair or deceptive act in the business of insurance pursuant to subsection 4(b) of Board Order 18663. *Id.* at 140. Only those specific supreme court determinations, however, would subsequently be actionable under subsection 4(b), in Justice Phillips' opinion. *Id.*

134. *Id.* at 135-36.

deceptive acts or practices without listing or otherwise identifying the prohibited conduct.[135] Subsection (b) contains the laundry list of prohibited conduct actionable by "consumers" under the DTPA.[136] Since all of section 17.46 is incorporated into section 16 of article 21.21, an insured is entitled to allege not only a laundry list item under section 17.46(b), but also may allege that any conduct by the insurer was a false, misleading or deceptive act or practice.[137]

The supreme court in *Vail* adopted the insured's argument that Texas Farm's failure to promptly, fairly and equitably settle their claim when liability became reasonably clear was an unlisted false, misleading or deceptive trade practice prohibited by section 17.46(a) of the DTPA.[138] As such, it was actionable under section 16 of article 21.21 and, by incorporation, under section 17.50(a)(4) of the DTPA.[139] This adopts the holding by the Tyler Court of Appeals in *Allstate Insurance Company v. Kelly*[140] that unfair and deceptive acts or practices committed by an insurer in the handling of an insured's claim are actionable under section 17.46(a), as incorporated into section 16 of article 21.21.[141] It is also a reconfirmation of the opinion in *Royal Globe Insurance Co. v. Bar Consultants, Inc.*[142] which recognized that section 16 of article 21.21 creates a cause of action under section 17.46(a) of the DTPA wholly independent of the relief available to consumers under the DTPA.[143]

The court in *Vail* determined that the jury finding that Texas Farm

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135. TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon 1987).

136. TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 1987).

137. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 135 (Tex. 1988)(Insurance Code article 21.21 section 16 incorporates any unlisted practice that is false, misleading, or deceptive); Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 605 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)(Insurance Code provides private cause of action for unfair and deceptive acts).

138. *Vail*, 754 S.W.2d at 135.

139. *Id.* at 136.

140. 680 S.W.2d 595 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

141. *Id.* at 598. The claim asserted in *Kelly* was brought by the insured as a result of the insurer's negligent failure to settle a claim asserted by a third party under an automobile policy. *Id.* Thus, the result in *Kelly* was that a negligent failure to settle under the doctrine pronounced in *Stowers Furniture Co. v. American Indemnity* Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved), constitutes a false, misleading and deceptive trade practice prohibited Section 17.46(a) of the DTPA. The opinion in *Vail* simply applies this rationale from the area of third party claims to first party claims as between an insured and insurer.

142. 577 S.W.2d 688 (Tex. 1979).

143. *Id.* at 692-94.

had failed to exercise good faith in the investigation, processing, and denial of the Vails' claim constituted a false, misleading and deceptive act in violation of section 17.46(a) of the DTPA.[144] The court's opinion recognized the requirement first announced in *Spradling v. Williams*[145] that in proving an action under section 17.46(a), the plaintiff must secure findings not only that the conduct occurred but that the conduct was false, misleading or deceptive.[146] The court found that the single special issue which found that Texas Farm had failed to exercise good faith satisfied this requirement.[147] On the surface, this holding does not seem in harmony with the requirement of *Spradling v. Williams* for obtaining two specific jury findings.[148] The dissenting opinion of Justice Phillips in *Vail* criticized the court's holding that the Vails properly proved a violation of an unlisted deceptive trade practice under section 17.46(a) without a specific finding that Texas Farm's conduct was a deceptive act.[149] Neither of the dissenting opinions disagreed, however, with the holding that a violation of section 17.46(a) is actionable as incorporated under section 16 of article 21.21. The better practice would clearly require a jury finding that the conduct in issue occurred and a secondary finding that the conduct was a false, misleading or deceptive act or practice.

C. *Damages*

Under both the DTPA and article 21.21, a successful plaintiff is entitled to recover actual damages produced by the defendant's unlawful conduct.[150] The term "actual damages" is not defined under either statute; however, it has been construed in cases brought under

144. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 135 (Tex. 1988).

145. 566 S.W.2d 561 (Tex. 1978).

146. *Id.* at 564 (plaintiff must prove unlisted conduct occurred and was deceptive).

147. *See Vail*, 754 S.W.2d at 135-36 (jury's finding that insurance company intentionally failed to exercise good faith is unlisted deceptive trade practice).

148. Spradling v. Williams, 566 S.W.2d 561, 564 (Tex. 1978); *see also* Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 601 (Tex. App.—Tyler 1984, writ ref'd n.r.e.). In *Allstate Insurance Co. v. Kelly*, the court's opinion specifically recites the jury findings, which included a finding that Allstate's failure to inform its insured of the settlement offer by the third party claimant was a false, misleading and deceptive practice which caused the entry of a judgment in excess of the policy limits. *Id.* The jury also found that Allstate was not attempting in good faith to settle the insured's claim in a prompt, fair and equitable manner. *Id.*

149. *Vail*, 754 S.W.2d at 140 (Phillips, C.J., dissenting).

150. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1987)(prevailing consumer may recovery actual damages); TEX. INS. CODE ANN. art. 21.21, § 16(b)(1) (Vernon Supp. 1989)(plaintiff may recover actual damages).

the DTPA to mean those damages recoverable at common law.[151] A successful plaintiff in an action under the DTPA and article 21.21 is entitled to recover the greatest amount of actual damages alleged and factually established to have been caused by the unlawful conduct, including related and reasonable necessary expenses and lost profits.[152] Moreover, the recovery of damages under the DTPA can be cumulative to the recovery of damages caused by any other wrongful conduct by the defendant which are distinguishable from the statutory violations.[153] In the event a plaintiff fails to waive a surplus finding or otherwise elect as between a recovery of the same damages under alternative theories, it is the duty of the court to frame a judgment so as to give the successful plaintiff the maximum relief to which he may be entitled under the jury findings.[154]

In *Vail*, the court held that an insurer's unfair refusal to pay the insured's claim causes damages as a matter of law in *at least* the amount of the policy benefits wrongfully withheld.[155] The court's opinion in *Vail* suggests that other damages resulting from an insurer's delay in settling a claim are also recoverable.[156] In arriving at the conclusion that policy benefits constitute actual damages, the court observed that persons without insurance are allowed a recovery under the DTPA based upon false representations of coverage,[157] and

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151. *See, e.g.*, Kish v. Van Note, 692 S.W.2d 463, 466 (Tex. 1985)(actual damages in DTPA construed to mean common-law damages); Smith v. Kinslow, 598 S.W.2d 910, 915 (Tex. Civ. App.—Dallas 1980, no writ)(actual damages equivalent to common-law damages); Cantrell v. First Nat'l Bank of Euless, 560 S.W.2d 721, 727 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.)(DTPA actual damages are common-law damages).

152. *See, e.g.*, *Kish*, 692 S.W.2d at 466 (consumer may recover greatest amount of actual damages proven under DTPA); Frank B. Hall & Co. v. Beach, Inc., 733 S.W.2d 251, 265 (Tex. App.—Corpus Christi 1987, no writ)(Insurance Code permits injured party to recover greatest amount of actual damages alleged and proven); Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)(DTPA allows plaintiff to recover greatest amount of actual damages proven).

153. *See, e.g.*, *Kish*, 692 S.W.2d at 467 (recovery under DTPA cumulative and not exclusive of other remedies); Jim Walter Homes, Inc. v. White, 617 S.W.2d 767, 773 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.)(plaintiff not required to elect between remedies in DTPA and Consumer Credit Code).

154. *See* TEX. R. CIV. P. 301; *see also* Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 367 (Tex. 1987)(greater recovery allowed where party fails to elect between damages).

155. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 136 (Tex. 1988); *see also* Aetna Casualty & Sur. Co. v. Marshall, 724 S.W.2d 770, 771-72 (Tex. 1987); Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 606 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

156. *Vail*, 754 S.W.2d at 136.

157. *Id.*; *see also* Kennedy v. Sale, 689 S.W.2d 890, 892-93 (Tex. 1985).

that an insurer is also liable to its insured for its refusal or failure to settle third-party claims.[158] The court concluded that it would be incongruous to prevent an insured, who has paid premiums and is entitled to payment under the policy, from recovering damages where the insurer wrongfully denies or delays a valid claim.

With respect to claims of unfair settlement practices involving third party claims, damages include the deficiency between the policy benefits and any award or judgment owing to a third party claimant.[159] In both third party and first party claims, a plaintiff is entitled to recover mental anguish damages under the DTPA and article 21.21.[160] Physical injury is no longer a prerequisite to a recovery for mental anguish damages.[161] The only requirement for the recovery of mental anguish damages in a DTPA or article 21.21 case is to show that the defendant "acted knowingly or with conscious indifference, causing a relatively high degree of mental pain and distress, such as a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, or public humiliation."[162]

V. CONCLUSION

Statutory claims for unfair settlement practices by insurers began most recently in the 1984 opinion in *Allstate Insurance Company v. Kelly*[163] and continues to develop under *Vail v. Texas Farm Bureau Mutual Insurance Company*.[164] These claims are rooted in the DTPA and article 21.21, but depend primarily upon (1) the incorporation of the rules and regulations promulgated by the State Board of Insur-

158. *Vail*, 754 S.W.2d at 136; *see also* G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved).

159. *See* Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 605-06 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

160. *See* Underwriters Life Ins. Co. v. Cobb, 746 S.W.2d 810, 813, 819 (Tex. App.—Corpus Christi 1988, no writ); *see also* Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 117 (Tex. 1984).

161. St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 650 (Tex. 1987)(negligence action); Moore v. Lillebo, 722 S.W.2d 683, 686 (Tex. 1986)(wrongful death action).

162. Underwriters Life Ins. Co. v. Cobb, 746 S.W.2d 810, 819 (Tex. App.—Corpus Christi 1988, no writ); Group Hosp. Servs., Inc. v. Daniel, 704 S.W.2d 870, 878 (Tex. App.—Corpus Christi 1985, no writ)(quoting *Trevino v. Southwestern Bell Tel. Co.*, 582 S.W.2d 582, 584 (Tex. Civ. App.—Corpus Christi 1979, no writ).

163. 680 S.W.2d 595 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

164. 754 S.W.2d 129 (Tex. 1988).

ance under article 21.21 and (2) the definition of unfair and deceptive acts or practices in other provisions of the Insurance Code and in other determinations made pursuant to law. The result is that statutory insurer exposure for unfair or deceptive acts in denying or delaying insurance claims includes a mandatory trebling of all of the insured's actual damages, as well as costs of court and reasonable attorney's fees.