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Private Cause of Action for Unfair Insurance Claim Settlement Practices Exists under Texas Deceptive Trade Practices Act and Insurance Code.

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INSURANCE—Deceptive Trade Practices—Private Cause Of Action For Unfair Insurance Claim Settlement Practices Exists Under Texas Deceptive Trade Practices Act And Insurance Code.

Vail v. Texas Farm Bureau Mutual Insurance Company, 754 S.W.2d 129 (Tex. 1988).

In 1978, Melvin and Maryanne Vail (Vail) purchased a fire insurance policy for their home from Texas Farm Bureau Mutual Insurance Company (Texas Farm).[1] During the term of the policy, the Vails' home was completely destroyed by fire.[2] The Vails sought reimbursement through their insurance policy, but were notified by Texas Farm that their claim had been denied.[3] After pursuing their administrative remedies,[4] the Vails filed suit against Texas Farm, arguing that the company's unfair claim settlement practices[5] and bad faith failure to honor their claim[6] violated both the De-

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1. Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 130 (Tex. 1988)(purchased fire insurance policy insuring home for $25,000.00 and contents at $10,000.00).

2. *Id.* at 130. The Vails' home and its contents were destroyed by fire on July 18, 1979. *Id.* The home and contents were valued under the policy at $35,000.00. *Id.* The policy on their home was a valued policy and therefore the contract itself sets the value of the property and it was not necessary for the Vails to prove the actual loss. *Id.* at 137. Proof of the loss of their contents was required, however, and the jury found the Vails' content loss to be the amount of coverage, $10,000.00. *Id.*

3. *Id.* at 131. Texas Farm's agent said the company would not "willingly" pay this claim because an adequate list of the contents destroyed in the fire had not been provided. Texas Farm hired an investigator, who found no indication of arson. After this finding, Texas Farm commissioned a second investigation conducted by the State Fire Marshall's office. The Fire Marshall's office analyzed four samples of the debris left from the fire, three of which indicated some evidence of arson. Based on the Marshall's evidence, Texas Farm then changed its basis for denial of the claim from an "inadequate list" to arson. In the trial court, expert testimony discredited much of the validity of the Fire Marshall's tests. Subsequently on appeal, arson was no longer raised as an issue and Texas Farm did not dispute their liability for the claim under the policy. *See* Texas Farm Bureau Mut. Ins. Co. v. Vail, 695 S.W.2d 692, 694 (Tex. App.—Dallas 1985), *rev'd*, 754 S.W.2d 129 (Tex. 1988). Texas Farm admitted on appeal that the full amount of the policy was due and payable and conceded the judgment was correct in that respect. *Id.*

4. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 137 (Tex. 1988)(Vails sent letter to Farm Bureau making demand for payment). The letter stated in part:

> This letter is to officially make demand upon you for payment under the policy for the value of the dwelling and the lost contents to the extent of the full coverage of the policy.

Id.

5. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 132 (Tex. 1988)(Texas Farm failed to promptly, fairly and equitably settle their claim after liability clearly estab-

ceptive Trade Practices Act (DTPA)[7] and the Texas Insurance Code.[8] In addition to these statutory allegations, the Vails also asserted that Texas Farm violated its common-law duty of good faith and fair dealing.[9] At trial, the jury found in favor of the Vails and awarded them full recovery of the policy amount,[10] as well as treble damages under the DTPA[11] and other additional damages.[12] Texas Farm appealed[13] and the court of appeals re-

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lished); *see also* TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981), Section 2 lists six acts or practices considered to be unfair claim settlement practices. *Id.* The failure to act in good faith in providing prompt, fair, and equitable payment of a claim submitted where the insurer's liability is reasonably clear, is among the six definitions listed as unfair or deceptive practices. *See id.* § 2(d).

6. *See Vail*, 754 S.W.2d at 131 (jury found Texas Farm intentionally failed to process claim in good faith since they refused prompt, fair and equitable settlement after liability established).

7. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon 1987)(consumer has cause of action when any person violates Article 21.21 of Insurance Code or rules or regulations issued by Insurance Board and such acts produce actual damages); *see also Vail*, 754 S.W.2d at 131 (Vails asserted cause of action under section 17.50(a)(4) of DTPA).

8. *See* TEX. INS. CODE ANN. arts. 21.21, 21.21-2 (Vernon 1981 & Supp. 1988). Article 21.21, section 16(a) lists the relief available to injured parties. *See id.* Under this section any person who prevails in the action against the insurance company may be awarded three times the actual damages, courts costs and reasonable attorney's fees; or an order enjoining the conduct; or any relief the court finds proper. *See id.* § 16(b). If the court finds, however, an action was brought in bad faith or for harassment purposes, the court may then award the defendant reasonable attorney's fees. *See id.* § 16(c). Article 21.21-2 section 2 defines acts which if frequently committed, constitute unfair claim settlement practices. *See id.* Under section 6(a) the State Board of Insurance is given the power to issue cease and desist orders if they find an insurance company engaging in unlawful practices. *Id.*

9. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 135 (Tex. 1988)(insurance company breaches duty of good faith and fair dealing if it fails to promptly and equitably pay claim when its liability becomes reasonably clear); *see also* Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 212 (Tex. 1988)(common law duty of care and trustworthiness is implied in every contract, including insurance contracts); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987)(duty to deal in good faith and deal fairly recognized). *See generally* G. KORNBLUM, M. KAUFMAN & H. LEVINE, BAD FAITH PRACTICE GUIDE 1-1 (1986)(term bad faith indicates breach of covenant of "good faith and fair dealing" which is implied in every contract by law and gives rise to both tort liability and breach of contract); Comment, *Arnold v. National County Mutual Fire Insurance Co.: Texas Adopts First-Party Bad Faith*, 39 BAYLOR L. REV. 835, 836 (1987)(common law remedy for post-loss conduct of insurance company allowing recovery for amount due provided little motivation for insurance company to pay claims owed until Texas recognized this duty). *But see* Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 642 (Tex. 1987)(good faith and fair dealing not recognized in Texas).

10. *See Vail*, 754 S.W.2d at 131 (full policy amount was $35,000).

11. *See* Texas Farm Bureau Mut. Ins. Co. v. Vail, 695 S.W.2d 692, 695 (Tex. App.—Dallas 1985)(trebled policy amount was $105,000.00), *rev'd*, 754 S.W.2d 129 (Tex. 1988).

12. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 130 (Tex. 1988). At trial, the jury awarded three times the value of the policy which amounted to $105,000. In addition, the court awarded attorney's fees and prejudgment interest of 6% from date of judg-

versed, in part, stating that a private cause of action was not provided by article 21.21-2 of the Insurance Code or by the DTPA.[14] The Vails were allowed to recover the amount of their policy plus prejudgment interest and attorney's fees from Texas Farm but were denied additional damages under the DTPA.[15] The Vails appealed to the Texas Supreme Court which granted certiorari to decide whether the court of appeals was correct in reversing the trial court's award of treble damages and its holding that no private cause of action existed for unfair claim settlement practices under both the DTPA and Insurance Code.[16] Held—*Reversed*. A private cause of action for unfair insurance claim settlement practices exists under the Texas Deceptive Trade Practices Act and Insurance Code.[17]

For centuries, business and consumer transactions were governed by the common law and its general rule of caveat emptor: let the buyer beware.[18]

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ment which totaled $22,869.84. There is a split of authority between courts allowing trebled prejudgment interest. *Compare* Industrial-Ri-Chem Laboratory, Inc. v. Par-Pak Co., Inc., 602 S.W.2d 282, 298 (Tex. App.—Dallas 1980, no writ)(allowed trebled prejudgment interest) *with* Precision Homes, Inc. v. Cooper, 671 S.W.2d 924, 930-31 (Tex. Civ. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)(did not allow trebled prejudgment interest).

13. *See* Texas Farm Bureau Mut. Ins. Co. v. Vail, 695 S.W.2d 692, 693 (Tex. App.—Dallas 1985)(appealed damage award claiming liability for face amount of policy, prejudgment interest upon dwelling policy, and attorney's fees), *rev'd*, 754 S.W.2d 129 (Tex. 1988).

14. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 131 (Tex. 1988)(court of appeals reversed trial court's decision holding no private cause of action under either DTPA or Insurance Code); *see also* Texas Farm Bureau Mut. Ins. Co. v. Vail, 695 S.W.2d 692, 694 (Tex. App.—Dallas 1985)(court of appeals held neither article 21.21-2n or DTPA created private cause of action), *rev'd*, 754 S.W.2d 129 (Tex. 1988)(only available remedy was cease and desist order issued by State Board of Insurance).

15. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 131 (Tex. 1988)(court of appeals reversed trebled damages and granted recovery of policy amount, prejudgment interest and attorney's fees); *see also Texas Farm*, 695 S.W.2d at 695 (judgment modified to allow recovery of policy amount, prejudgment interest at six percent on policy amount and $12,640.00 as attorney's fees). This appeal was heard before Justice Allen of the Court of Appeals of Dallas and, by two retired justices, the Honorable Bert H. Tunks, Chief Justice, 14th Court of Appeals, Houston and The Honorable Quentin Keith, Justice, Ninth Supreme Judicial District sitting by assignment. *Id.* at 693 n.1 & 2.

16. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 130 (Tex. 1988)(court addressed whether insured had cause of action against insurer for unfair settlement practices of claim under which Vails contended they had properly plead case, and had proved injury under Deceptive Trade Practices Act and/or Texas Insurance Code).

17. *Id.* at 136.

18. *See* Barnard v. Kellogg, 77 U.S. 383, 388 (1870)(caveat emptor established common law principle). There is not a better established principle in common law than the maxim of caveat emptor. *Id.* This rule is best adapted to business transactions and requires the purchaser to take care of his own interests. *Id.*; *see also* Kellogg Bridge Co. v. Hamilton, 110 U.S. 108, 116 (1884)(as to ordinary sales, both buyer and seller are on equal grounds and buyer purchases on own judgment entirely); D. PRIDGEN, CONSUMER PROTECTION AND THE LAW § 2.03 (1988)(doctrine of caveat emptor considered buyer who believed seller's false claims

The Texas legislature recognized that this rule left consumers virtually defenseless against misrepresentation, unfair treatment and breach of warranty by the business community.[19] To address these problems, Governor Dolph Briscoe signed the Deceptive Trade Practices Consumer Protection Act (DTPA) into law[20] in 1973.[21] Since its creation, the DTPA has been the

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unworthy of legal protection). A medieval scholar, Anthony Fitzherbert, is given credit for originating the phrase in 1534. *Id.* He originated the phrase when advising a prospective horse buyer "[i]f he be tame and have been ryden upon then caveat emptor." *Id.* Nineteenth century judges saw no injustice or inconvenience from this doctrine because they felt it "sharpened wits, taught self-reliance, made a man—an economic man—out of the buyer, and served well its two masters, business and justice". *Id.* at 2-6. The promoters of this doctrine believed it was good medicine and taught them to look out for their interests. *Id* at 2-7; *see also* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1164 (1931)(doctrine of caveat emptor first appeared in print at end of sixteenth century). Finally, caveat emptor was declared by Mr. Justice Davis, of the United States Supreme Court, to be of universal acceptance that it should be accepted by all the courts in the United States where common law prevails. *Id.* at 1181. The doctrine has been refined through the years to limit its harshness but caveat emptor still retains some merit and still means that buyers in their purchases are still playing a game of chance. *Id.* at 1187.

19. *See* Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices-Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 617-18 (1977)(although continually subject to unlawful business practices, consumer had almost no legal recourse); *see also* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION v (2d ed. 1983). Remedies at common law to prevent consumers from receiving numerous phone calls, fraudulent misrepresentations, and insolent language from debt collectors were inadequate because the consumer had the heavy burden of proof as well as the high cost of litigation. *Id.* Landlords had the right to cut off a tenant's utilities, to wrongfully withhold the tenant's security deposit or in some drastic cases, prevent the tenant from residing on the leased premises. Salesmen could pressure consumers into buying expensive items they did not want or need and sellers could exaggerate the value of their services or goods. Even though these actions were not lawful, the consumer could do little because it was not practical to pursue a small claim due to the high cost of litigation. *Id.*

20. *See* Deceptive Trade Practices-Consumer Protection Act, ch. 143, § 5, 322, 343, Tex. Gen. Laws 1973 (first enactment of DTPA); *see also* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION v (2d ed. 1983). John L. Hill, Attorney General when the DTPA was passed, declared that the Act sought to rectify the dilemma the consumer faced when bringing an action under breach of warranty or common law fraud. *Id.* at iv. A consumer claimant faced numerous defenses to his suit as well as the fact that many of the cases were only for a nominal dollar amount which made litigation impractical. The Attorney General's staff, in association with representatives of both the Texas Consumer Association and Texas Retail Federation, drafted a proposal, which later became the DTPA, to remedy the consumer's problems. *Id.*; Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices-Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 620 (1977). Initially, the Texas legislature to correct the consumer's dilemma, enacted the Debt Collection Practices Act which prohibited debt collectors from using coercion, threats, harassment, unfair means or misleading representations. *Id.* at 619. The next effort concerned tenant rights and prohibited landlords from interrupting utility service and from intentionally preventing the tenant from entering his residence. Consumers were next given the right in home solicitations to cancel without obligation within three business days. *Id.* at 620. Finally, of even more significance

topic of legislative scrutiny and emendation in each subsequent legislative session.[22]

In 1977, the Texas Supreme Court first interpreted the DTPA in *Woods v. Littleton*.[23] In *Woods*, the court recognized that the legislative intent in drafting the DTPA was to encourage consumers to pursue relief while deterring sellers from engaging in deceptive trade practices.[24] Decisions following *Woods* further expanded the DTPA by finding that the legislative intent was not to be gleaned from isolated portions of the act but rather from the act taken as a whole.[25] Further guidance to the DTPA's construction was

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was the passage of the DTPA and its remedies and authorization of private consumers to recover treble damages. *Id.* at 621.

21. *See, e.g.*, Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980)(DTPA's purpose to extend cause of action to consumers for deceptive trade practices by taking away burden of proof and numerous common-law defenses for breach of warranty or fraud); Woo v. Great Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)(enactment of DTPA reflects legislature's recognition of shortcomings of traditional common law remedies for deceptive trade practices); Success Motivation Institute, Inc. v. Lawlis, 503 S.W.2d 864, 867 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.)(pre-DTPA common-law fraud action allowed recovery of difference between value parted with and value received). *See also* Bragg, *Now We're All Consumers! The Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1, 7-8 (1976)(passage of DTPA by Texas legislature removed many obstacles facing deceived consumer and ended use of caveat emptor); Maxwell, *Public and Private Rights and Remedies Under the Deceptive Trade Practices -Consumer Protection Act*, 8 ST. MARY'S L.J. 617, 620-21 (1977)(DTPA most significant and far-reaching consumer litigation passed, especially in remedial measures).

22. *See* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION xxx (2d ed. 1983 and Supp. 1988)(Deceptive Trade Practices Act amended in each legislative session beginning 1975 through last legislative session in 1987).

23. 554 S.W.2d 662, 665 (Tex. 1977)(plaintiffs found to be consumers under DTPA and even though sale occurred prior to effective date of DTPA, action complained of occurred after effective date and was valid claim).

24. *See id.* at 669 (*Wood* court acknowledged intent of legislature in drafting DTPA was to encourage injured consumers to seek compensation and deter perfidious sellers who engage in deceptive trade practices); *see also* TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987)(liberal construction and application of DTPA to further its purpose to protect consumers from unconscionable actions, "false, misleading and deceptive business practices" and breaches of warranty); McDaniel v. Dulworth, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ)(DTPA provides effective relief to aggrieved consumers who could not or would not sue but for these remedies); Curry, *The Texas Supreme Court and the DTPA: Ten Years After*, in STATE BAR OF TEXAS, 1987 DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION INSTITUTE A-1 (1987)(*Wood* decision expansively interpreted scope of DTPA to affect consumer protection).

25. *See* Pennington v. Singleton, 606 S.W.2d 682, 686 (Tex. 1980)(legislative intent should be ascertained from language of act as whole and not from isolated sections). Courts are not limited by a strict meaning, but should apply the legislative intent. *Id.*; *see, e.g.*, Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987)(DTPA to be liberally construed and used to promote purpose to protect consumers from breaches of warranty and provide economical course of action to secure protection); North Am. Van Lines of Texas, Inc.

provided in *Smith v. Baldwin*, which explained that the primary aim of the DTPA was to give consumers, who were harmed by deceptive trade practices, a cause of action without the heavy burden imposed by common law of proving fraud or breach of warranty.[26]

Because the DTPA was enacted to protect the "consumer,"[27] the injured party must qualify under the DTPA's definition of "consumer" in order to maintain a cause of action.[28] A consumer is defined as one who either seeks

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v. Bauerle, 678 S.W.2d 229, 236 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.)(act should be construed liberally to protect consumers from misleading, false, and deceptive business practices); Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 189 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(liberal construction to be given to act to promote purpose to protect consumer). *See generally* Curry, *The Texas Supreme Court and the DTPA: Ten Years After*, in STATE BAR OF TEXAS, 1987 DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION INSTITUTE A-1 (1987)(over past ten years approximately 69 Texas Supreme Court decisions rendered without court waivering from commitment to preserve legislative intent of Act to protect consumers).

26. *See* Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1981)(DTPA not merely codification of common law but enacted to provide cause of action without consumer having to counter numerous defenses developed at common law for breach of warranty or fraud action); *see also* Pennington v. Singleton, 606 S.W.2d 682, 690 (Tex. 1980). In *Pennington*, the court stated that:

> [O]ne purpose of DTPA's treble damages provision is to encourage privately initiated consumer litigation, reducing the need for public enforcement. Probably the greatest obstacle to private consumer litigation is the high costs, in terms of money and time, that must be expended by the plaintiff. The small amount involved in the typical consumer claim does not justify these high costs of litigation. Recognition of this disincentive to sue may even encourage wrongful trade practices by some sellers. The legislature has provided for extra damage recovery so that consumers will have incentives to pursue their claims.

Id. In *Jim Walter Homes v. Valencia*, the court stated that the legislature recognized that trebling damages in each case was harsh, particularly in cases when innocent misrepresentations where subjected to this penalty. *See* Jim Walter Homes, Inc. v. Valencia, 690 S.W.2d 239, 241 (Tex. 1985). In *Valencia*, the court acknowledged that the legislature amended the DTPA in 1979 to mitigate these effects while still making every effort to protect the consumer. *Id.* at 241. Through these amendments, the legislature sought to: 1. maintain mandatory treble damages for causes of action concerning small claims; 2. innocent misrepresentations were eliminated from automatic treble damages; and 3. consumers were still allowed to recover treble damages for knowing violations under the DTPA. The purpose behind allowing multiple recovery is to encourage the initiation of litigation by consumers and deter violations of the DTPA by sellers. *Id.* at 242.

27. *See* TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987)(purpose of DTPA to protect consumer); *see also* Woods v. Littleton, 554 S.W.2d 662, 670 (Tex. 1977)(DTPA enacted to provide consumers with method and incentive to dissuade deceptive trade practices); Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 189 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(purpose of DTPA to protect consumers from false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty).

28. *See* TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987)(definitional provision of DTPA including definition of consumer). This section defines consumer as "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or ac-

or acquires goods or services for purchase or lease.[29] The purchase of an insurance policy has been held to be a service under the DTPA and, therefore, within its protection.[30] In addition to protection under the DTPA, one who purchases insurance may also maintain a cause of action under the Texas Insurance Code.[31] Under the Insurance Code, the term "consumer"

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quires by purchase or lease, any goods or services . . . ." *Id.*; *see also* Kennedy v. Sale, 689 S.W.2d 890, 892-93 (Tex. 1985)(employee for whom insurance purchased held to be consumer; standing as consumer determined by person's relationship to proceeding and simply not granted in contractual relationship); TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 1987)(cause of action may be maintained by consumer when actual damage results). Consumers may maintain a cause of action when the act or practice is the producing cause of the damage. *Id.* Section 17.50(a)(1) grants consumers relief when actual damage is produced by "the use or employment by any person of an act or practice in violation of Article 21.21, Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code, as amended." *Id.*; Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975)(defines producing cause as efficient, contributing or exciting cause which produces injury or damage in natural sequence). *See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 207-10 (2d ed. 1983 & Supp. 1988)(producing cause is test for showing causation).

29. *See* TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987)(section defines consumer as one who seeks or acquires good or services); Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 351 (Tex. 1987). There are two requirements which must be met to acquire the DTPA consumer status. The first requirement is that the plaintiff sought or acquired the good or service by a purchase or lease. Second, the good or service purchased or leased has to form the reason for the complaint. *Id.* at 351-52; Kennedy v. Sale, 689 S.W.2d at 892 (person who did not actually seek insurance policy but who had acquired benefits of coverage allowed to recover under DTPA as consumer). *But see* Rodriguez v. Texas Employers' Ins. Ass'n, 598 S.W.2d 677, 678 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.). Under the DTPA, a consumer must actually seek or acquire the good that relates to or results in the deceptive practice claim. *Id.* Merely seeking or acquiring a good or service is not enough to receive the consumer protection. *Id.*

30. *See* Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 190 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(insurance policies included under protection and coverage of section 17.50 of DTPA); *see also* TEX. BUS. & COM. CODE ANN. § 17.45(2) (Vernon 1987)(defining service as work, labor, or service acquired for use); D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 26, 172 (2d ed. 1983)(purchase of insurance constitutes purchase of service under Insurance Code and plaintiff not required to conform to DTPA definition of "consumer" but must be "person" to maintain cause of action). *But see* Jay Freeman Co. v. Glenn Falls Ins. Co., 486 F. Supp. 140, 142 (N.D. Tex. 1980)(not intent of DTPA to include insurance policies within coverage since insurance policies intangible contractual rights); *cf.* Mobile County Mut. Ins. Co. v. Jewell, 555 S.W.2d 903, 910 (Tex. Civ. App.—El Paso 1977)(at time of decision, county mutual insurance companies exempt from state's insurance laws except as specifically provided), *writ ref'd n.r.e. per curiam*, 566 S.W.2d 295 (Tex. 1978).

31. *See* TEX. INS. CODE. ANN. art. 21.21, §§ 1-24 (Vernon 1981 and Supp. 1988)(section of Insurance Code dealing with unfair practices and competition). Section 1 of article 21.21 provides that the purpose of the act is for regulation of trade practices within the insurance business and also to define or provide for determination of the practices which are unfair or deceptive and prohibit such actions. *Id.* § 1. Section 3 provides that no person shall engage in

has been replaced by "person," thus avoiding the definitional requirement of "consumer" under the DTPA.[32] Therefore, when an unfair or deceptive practice is committed by an insurance company[33] against a "consumer"

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any practice defined or determined in accordance with this Act to be a method of competition which is unfair or engage in an act or practice which is deemed to be unfair or deceptive in the practice of the insurance business. *Id.* § 3. Section 4 lists eight definitions within this article which are either unfair competition methods or acts or practices which are unfair or deceptive. *Id.* § 16. Section 16 provides the relief available to injured persons. This relief is available to persons injured by practices which are defined in section 4, or if injured by noncompliance to a rule or regulation adopted by the Board of Insurance to be unfair or injured by any practice contained in section 17.46 of the Business and Commerce Code. *Id.* §§ 1-24; *see also* Austin v. Servac Shipping Line, Ltd., 610 F. Supp. 229, 235 (E.D. Tex. 1985)(plaintiff sought and received relief under article 21.21, section 16 of Insurance Code for violations of Insurance Board Order when defendant insurance company denied claim and refused to pay claims absent investigation).

32. *See* TEX. INS. CODE ANN. art. 21.21, § 2(a) (Vernon Supp. 1988)(definition of "person" within provision). This section defines person 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 insurance counselors." *Id.* A court of civil appeals decision held the definition of "person" only included those who worked in the business of insurance. *See* Ceshker v. Bankers Commercial Life Ins. Co., 558 S.W.2d 102, 104 (Tex. Civ. App.—Tyler 1977), *writ ref'd n.r.e. per curiam*, 568 S.W.2d at 128 (Tex. 1978). In the per curiam opinion which followed, however, the supreme court disapproved that portion of the opinion which limited "person" to one working in the insurance business. *See* Ceshker v. Bankers Commercial Life Ins. Co., 568 S.W.2d at 129; *see also* Hi-Line Elec. Co. v. The Travelers Ins. Co., 587 S.W.2d 488, 490-91 (Tex. Civ. App.—Dallas 1979), *writ ref'd n.r.e. per curiam*, 593 S.W.2d 953 (Tex. 1980). The court of civil appeals had held that a "person" under article 21.21, section 16(a) also had to be a consumer under section 17.50 of the DTPA because these two statutes had to be read together. *Id.* The supreme court did not overturn this decision but in their per curiam opinion stated they did not approve the conclusion that a "person" also had to qualify as a consumer under the DTPA to allow a private cause of action under article 21.21 of the Insurance Code. Hi-Line Elec. Co. v. The Travelers Ins. Co., 593 S.W.2d 953, 954 (Tex. 1980); *cf.* Chaffin v. Transamerica Ins. Co., 731 S.W.2d 728, 731 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.)(although "person" not limited to one in business of insurance, decision limited person under Insurance Code as one who is either beneficiary under policy or insured himself). *See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 172 (2d ed. 1983 and Supp. 1988)(whether one is agent, insurance company, insured, competitor, beneficiary, consumer, or just member of general public, it is clear, if injured, claim exists under Insurance Code).

33. *See* TEX. INS. CODE ANN. art. 1.14-1, § 2 (Vernon 1981 & Supp. 1988)(all aspects of insurance business covered under definition of insurance industry, including conduct ranging from initial solicitation to payment of claims). Under this article, the term insurer includes all associations, corporations, partnerships and individuals. *See* TEX. INS. CODE ANN. art. 1.14-1, § 2a (Vernon Supp. 1988). Acts which constitute conducting an insurance business in Texas include: 1. making or proposing an insurance contract; 2. taking or receiving any insurance application; 3. directly or indirectly acting as agent by soliciting, negotiating or procuring insurance or any renewals. *Id.* This section provides in total ten acts which if accomplished by mail or any other means is defined as conducting an insurance business in Texas. *Id.*; *see*

purchasing insurance, a cause of action arises under both the DTPA and the Texas Insurance Code.[34]

Under the DTPA and article 21.21 of the Insurance Code, a private cause of action may be brought when the rules or regulations issued by the State Board of Insurance or the direct provisions of article 21.21 are violated.[35] In addition to these provisions, section 17.46 of the DTPA provides that any conduct which is "false, misleading or deceptive," includes, but is not limited to, a twenty-four item "laundry list" of such acts or practices deemed unlawful.[36] Section 17.50 of the DTPA also provides two additional causes

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also Kreisler, *A Survey of Insurance Litigation Under the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 177, 177 (1987). The insurance business has been attacked by the Texas consumer with a formidable weapon; the DTPA in conjunction with the Texas Insurance Code. *Id.* The three major areas of attack have been on the acts of insurance agents as well as on the handling of first and third party claims. *Id.*

34. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon 1987)(consumer granted cause of action when person violates article 21.21 of Insurance Code or regulations of State Board of Insurance). Any person who uses or employs an act or practice which violates Article 21.21 of the Texas Insurance Code or violates any rule or regulation of the State Board of Insurance, is subject to an action by a consumer where these acts are a producing cause of damages. *Id.*; *see also* TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon Supp. 1988)(person may maintain action against person who engages in unlawful deceptive trade practice under section 4 of article, under rules and regulations of Board under this article or under any practice listed in Section 17.46 of Business & Commerce Code). *See generally* D. BRAGG. P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 169-70 (2d ed. 1983)(section 17.50(a)(4) of DTPA specifically aimed at insurance industry since it authorizes suit for violation of insurance code which supplements action against insurance industry).

35. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon 1987)(provides cause of action when violation occurs under article 21.21 of Insurance Code or rules and regulations promulgated by State Board of Insurance under article 21.21); *see also* Insurance, 28 TEX. ADMIN. CODE § 21 (Hart Nov. 1, 1986)(trade practices). Section 21.3 lists the trade practices which are prohibited and provides that even if the practice is not defined in any other section, it is prohibited if it is determined by law to be an unfair or deceptive act or practice. *Id.* This section derived from State Board of Insurance Order 18663. Section 21.203 prohibits all insurers from engaging in unfair claims settlement practices. Unfair claims settlement practices under this section are defined as committing or performing any one of the seventeen listed practices with "frequency" to indicate that this is a general business practice. *Id.* This section is derived from State Board of Insurance Order 41454. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 134-35 (Tex. 1988).

36. *See* TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987)(section 17.46(b) provides non-exclusive twenty-four item list of conduct considered to be "false, misleading or deceptive acts or practices" and declared unlawful when practiced in commerce or trade). Since 1979, section 17.46(a) is only enforceable by the Attorney General's Office and a private cause of action is no longer conferred under this section. *See* Kreisler, *A Survey of Insurance Litigation Under the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 177, 180 (1987); *see also* Deceptive Trade Practices-Consumer Protection Act, ch. 603, § 3, 1979 Tex. Gen. Laws 1327 (amendment added language that false, misleading, or deceptive acts or practices subject to action by consumer protection division); TEX. BUS. & COM. CODE ANN. § 17.45(8) (Vernon 1987)(consumer protection division defined antitrust and consumer protection division of at-

of action, one for breach of an implied or express warranty and the other for unconscionable actions by any person.[37] These latter two causes of action, however, are not available to persons who sue an insurance company for unfair practices under section 16 of article 21.21 of the Insurance Code.[38] Therefore, a "consumer" who purchases insurance has several causes of action which may be pursued under section 17.50(a) of the DTPA as well as under article 21.21 of the Insurance Code.[39]

The DTPA and Insurance Code have repeatedly been used against the insurance industry in the area of first and third party claims,[40] particularly in cases involving sales misrepresentations and post-loss claims misconduct.[41] Liability for third-party claims is well recognized and this rationale

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torney general's office). There is some indication, however, that this limitation against a private cause of action does not apply in suits brought against insurers under section 17.50(a)(4) of the DTPA and article 21.21 of the Insurance Code. *Id.*; *see also* Royal Globe Ins. Co. v. Bar Consultants, Inc., 577 S.W.2d 688, 694 (Tex. 1979)(private cause of action allowed under section 17.46 of DTPA); Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 605 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)(private cause of action allowed under 21.21 of Insurance Code in accordance with section 17.46 of DTPA).

37. *See* TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 1987)(section 17.50(a)(2) provides action for breach of warranty and section 17.50(a)(3) provides unconscionable conduct action).

38. *See* TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon Supp. 1988)(provides relief to persons sustaining actual damages as result of another's unfair acts or practices). A person who sues under section 16 of article 21.21 has three available causes of action. One action is for a violation of practices declared unfair in section 4 of article 21.21. Another action may be maintained for a violation of any of the rules or regulations adopted by the Insurance Board and the last cause of action is allowed for a violation of any practice as defined in section 17.46 of the DTPA. *Id.*; *see also* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION § 7.02.03 (2d ed. 1983 & Supp. 1988).

39. *See* TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 19887)(provides relief for consumers actually damaged); TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 1988)(provides cause of action for unfair practices and competition).

40. *See* W. SHERNOFF, S. GAGE & H. LEVINE, INSURANCE BAD FAITH LITIGATION 5-3 (1987). A first party claim arises under an insurance policy where the insurance company agrees to pay the benefits directly to the insured. *Id.* Types of insurance which give rise to first-party claims include life, health and accident insurance, property damage, fire, title and disability insurance. The third party claim arises in situations where the insured buys insurance which will protect him from liability to third parties because the insurance company indemnifies the insured. *Id.*

41. *See, e.g.*, Aetna Casualty and Sur. Co. v. Marshall, 724 S.W.2d 770, 772 (Tex. 1987)(misrepresentations concerning coverage and benefits exactly type of conduct which gives rise to cause of action under DTPA); Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983)(transaction continues past time of purchase and encompasses entire course of dealings between parties); Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 603 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)(post-loss conduct forms basis for cause of action under DTPA). *See generally* Kreisler, *A Survey of Insurance Litigation Under the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 177, 177 (1977)(DTPA and Insurance Code used

may serve as the foundation for allowing first-party claims.[42] Despite long-standing precedent holding third-party claims as a valid cause of action against an insurance company,[43] the insurance industry contends that the consumer is barred from bringing a first party cause of action for acts or practices arising from post-loss claims under either the DTPA or the Insurance Code.[44]

The insurance industry asserts that a breach by an insurance company does not terminate its obligations because the insured still has a right to be paid under the policy and therefore is not damaged.[45] In addition, the industry asserts the legislature enacted article 21.21-2 of the Insurance Code to provide an adequate remedy for injuries resulting from unfair claim settlement practices.[46] This section provides for action by the Board of Insurance

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by consumers against insurance industry for sales misrepresentations and post-loss misconduct).

42. *See* G.A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, opinion approved). This landmark decision allowed liability to occur in a mishandling of third-party claims. *Id.* The rationale behind this decision in allowing the third-party claim was that the insurer had the exclusive control to handle the plaintiff's affairs and at the same time was acting as his agent. *Id.*; *see also Kelly*, 680 S.W.2d at 605 (DTPA and Insurance Code provide private cause of action in *Stowers* doctrine case for post-loss misconduct, and former opinion to contrary clearly erroneous). *But see* Rosell v. Farmers Texas County Mut. Ins. Co., 642 S.W.2d 278, 279 (Tex. App.—Texarkana 1982, no writ)(failure to negotiate third party claim in good faith not actionable under section 17.50 of DTPA). *See generally* Comment, *An Insurer's Failure to Settle: Standing Under the Stowers Doctrine, Texas Deceptive Trade Practices Act, and Article 21.21 of the Insurance Code*, 34 BAYLOR L. REV. 441, 442 (1982)(*Stower*'s doctrine still powerful force in insurance litigation and important factor for insurance company to consider when rejecting an insured's claim).

43. *See* G.A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, opinion approved)(rule would be harsh if insurance company owed no duty while it had complete control over the actions involved). The court held that the insurer cannot betray the insured's trust but must serve him as promised. *See id.* at 548.

44. *See, e.g.*, Alvarez v. Westchester Fire Ins. Co., 562 S.W.2d 263, 264 (Tex. Civ. App.—San Antonio 1978)(private citizen not given cause of action under article 21.21-2 of Insurance Code, and DTPA inapplicable to insurance policies and claims arising therefrom), *rev'd on other grounds*, 576 S.W.2d 771 (Tex. 1978); Lone Star Life Ins. Co. v. Griffin, 574 S.W.2d 576, 580 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.)(private cause of action not conferred upon individuals since legislature provided remedy for cease and desist orders as remedy for injury resulting from unfair claim settlement practice); 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 under Insurance Code or DTPA to private individual).

45. *See* Lone Star Life Ins. Co. v. Griffin, 574 S.W.2d 576, 580 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.)(plaintiff still has contractual right after breach occurs and remedy is to maintain suit to enforce contractual rights); *see also* Connecticut Gen. Life Ins. Co. v. Stice, 640 S.W.2d 955, 960 (Tex. App.—Dallas 1982, writ ref'd n.r.e.)(awarded benefits of policy so no actual damages resulted). Because the party recovered the benefits under the policy and was awarded that amount by the trial court, no actual damages had been sustained and the court rendered a take nothing judgment. *Id.*

46. *See* McKnight v. Ideal Mut. Ins. Co., 534 F. Supp. 362, 364 (N.D. Tex. 1982)(article

instead of the individual claiming unfair settlement practices.[47] Contrary to the insurance industry's contentions, some lower court decisions have affirmed a private cause of action for claims handling misconduct under the DTPA and article 21.21 of the Insurance Code.[48] Not all courts, however, agree that a private cause of action exists and instead have held that the Insurance Board is to issue cease and desist orders as the sanction for unfair or deceptive practices.[49] Finally, some courts have recognized a special relationship between the insurer and insured that implies a duty of good faith

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21.21-2 intended to give State Insurance Board authority to investigate and reprimand certain practices, not intended to provide individuals with private cause of action.); *see also Lone Star Life Ins. Co.*, 574 S.W.2d at 580 (legislature provided remedies for injuries resulting from unfair settlement practices by empowering State Board of Insurance to stop such practices by issuing cease and desist order); *Russell*, 548 S.W.2d at 742 (article 21.21-2 does not confer private cause of action, but empowers board to issue cease and desist orders); TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981)(unfair claims settlement practices act). Article 21.21-2, section 6(a) of the Insurance Code provides that the State Board of Insurance has power to issue, upon a finding that an insurer has violated any provision of the Act, a cease and desist order to stop the unlawful practices. *Id. See generally* Op. Tex. Att'y Gen. No. JM-218 (1984)(article 21.21-2 does not confer private cause of action but provides for cease and desist orders to be issued by Board of Insurance).

47. *See* TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981)(provides practices which are unfair claim settlements and remedies to be applied by State Board of Insurance). Section 3 of this article gives the State Board of Insurance power to require an insurance company, who has had complaints filed against it, to file a report and be subjected to close supervision. *Id.* Section 6 gives the Board the power to issue cease and desist orders to insurance companies violating any provision of this article. If the insurance company does not comply with the order, the Board is further given the power to revoke or suspend the company's certificate of authority. *Id.*

48. *See* Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 190 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(DTPA's underlying purpose to protect consumer and therefore grants individual private cause of action); *see also* Austin v. Servac Shipping Line, 610 F. Supp. 229, 235 (E.D. Tex. 1985)(plaintiffs allowed to incorporate Board Order which defined as unfair claim settlement practice denial and refusal to pay claim; relief granted under article 21.21 without incorporating 21.21-2); Humphreys v. Fort Worth Lloyds, 617 S.W.2d 788, 790 (Tex. Civ. App.—Amarillo 1981, no writ). The court held in *Humphreys* that:

> The legislature did not intend 21.21-2 to and it does not foreclose a private cause of action for the wrongful handling of an insurance claim by acts and practices which are declared, in other statutes the legislature enacted at the same session, to be unfair or deceptive in the business of insurance, and for which a private cause of action is sanctioned.

Id.

49. *See* Cantu v. Western Fire and Casualty Ins. Co., Ltd., 716 S.W.2d 737, 741 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.)(no private cause of action under article 21.21-2 of Insurance Code); Lone Star Life Ins. Co. v. Griffin, 574 S.W.2d 576, 580 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.) (private cause of action not granted to individual under Insurance Code for unfair claim practice); *see also* TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981)(provides investigation of unfair practices and remedy by State Board of Insurance through issuance of cease and desist order).

and fair dealing.[50] Lower court opinions, therefore, have resulted in conflicting views as to whether a private cause of action existed for a first party claim when the post-loss claim was mishandled.[51]

In *Vail v. Texas Farm Bureau Mutual Insurance Co.*,[52] the Texas Supreme Court addressed the question of whether an insured can maintain a cause of action for unfair claims settlement practices by an insurer under the DTPA or Texas Insurance Code.[53] The majority found that a cause of action for "unfair claims settlement practices" could be found under section 17.50(a)(4) of the DTPA on any of the three alternative grounds.[54] In

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50. *See* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987). 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. Compare Aranda v. Insurance Co. of North Am., 748 S.W.2d 210, 212 (Tex. 1988)(decision reiterates duty of insurer to deal fairly and duty found to arise out of special trust relationship between insured and insurer) *with* Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 642 (Tex. 1987)(supreme court failed to recognize duty of good faith and fair dealing and recovery limited to amount for breach of contract or tort). *See generally* G. KORNBLUM, M. KAUFMAN & H. LEVINE, BAD FAITH PRACTICE GUIDE - TEXAS EDITION (1987)(covenant of good faith and fair dealing implied in every contract, but when covenant breached, gives rise not only to breach of contract action but also to tort liability).

51. *Compare* Lone Star Life Ins. Co. v. Griffin, 574 S.W.2d 576, 580 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.)(Texas Insurance Code does not confer private cause of action to individual injured by unfair claim settlement practice) *and* Russell v. Hartford Casualty Ins. Co., 548 S.W.2d 737, 742 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.)(private cause of action not conferred to individuals for unfair claim settlement rather remedy is cease and desist order) *with* Humphreys v. Fort Worth Lloyds, 617 S.W.2d 788, 790 (Tex. Civ. App.—Amarillo 1981, no writ)(legislature did not intend to cut off private cause of action and did not foreclose private cause of action for unfair or deceptive acts in insurance industry) *and* Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 190 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(post-loss representation provided plaintiffs with cause of action). *See also* Kreisler, *A Survey of Insurance Litigation Under the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 177, 208 (1977)(law seems unsettled in first-party claims and Texas Supreme Court can settle).

52. 754 S.W.2d 129, 134-35 (Tex. 1988)(insured entitled to recover for failure by insured to pay claim under DTPA).

53. *Id.* at 136. The court allowed the Vails a private cause of action based upon the statutory allegations of the DTPA under section 17.50(a) and article 21.21 of the Insurance Code. *Id.* Additionally, the claim of a breach of the common law duty of good faith and fair dealing was also a basis for recovery. *Id.*

54. *Id.* at 136. The court stated that under section 17.50(a)(4) of the DTPA, the plaintiffs' alternatives were:

1. Art. 21.21 § 16 of the Insurance Code, section 4(a) of Board Order 18663 and the definition of unfair claims settlement practice in article 21.21-2 § 2(d) of the Insurance Code;
2. By incorporating art. 21.21 § 16 of Insurance Code, section 4(b) of Board Order 18663, and the determinations made by this court in *Arnold* and *Aranda*; and

reaching this conclusion, the majority recognized that the DTPA and Insurance Code both grant relief for "unfair or deceptive acts or practices" and, pursuant to the legislative mandate, both are to be construed liberally to promote their remedial goals.[55] The contention that the legislature had "sealed off" any private cause of action for unfair claims settlement practices under article 21.21-2 was rejected by the majority.[56] In addition, the majority relied on *Arnold*[57] and *Aranda*[58] in determining that an insurer's lack of good faith when processing a claim is a deceptive or unfair act or

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3. By incorporating art. 21.21 § 16 of the Insurance Code and section 17.46 of the DTPA.

Id. Under the first alternative, section 17.50(a)(4) incorporates the remedies provision of the Insurance Code art. 21.21, section 16. *Id.* at 132. Recovery is permitted under section 16 when any person has been injured by another party engaging in:

1. any of the practices declared to be unfair or deceptive by Section 4 of article 21.21;
2. conduct defined in rules or regulations lawfully adopted by the Board under article 21.21 as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance; or
3. any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice.

Id. at 132-133. The Vails' claim asserted Texas Farm's conduct was a violation of the second and third types of conduct listed in section 16. *Id.* at 133. The second type of conduct required incorporation of the State Board of Insurance Order 18663, which is now 28 TEX. ADMIN. CODE § 21.2 (Hart. Nov. 1, 1986). *Id.* Section 4(a) of this Board Order prohibits any person from engaging in practices which are defined in the Insurance Code as being unfair or deceptive. This section combined with the definition of unfair claims settlement found in art. 21.21-2 of the Insurance Code completes the first alternative. *Id.* The second alternative requires the incorporation of article 4(b) of Board Order 18663. *Id.* at 135. This section prohibits practices which are determined pursuant to law to be unfair or deceptive. *Id.* The previous supreme court decisions in *Aranda* and *Arnold* provided determination that were pursuant to law that an insurer who fails to process a claim in good faith is engaging in an unfair or deceptive act. The final alternative is based upon the third type of conduct prohibited in article 21.21 section 16. Although section 17.46 of the DTPA enumerates specific conduct which is false, misleading or a deceptive act, its list is not exclusive. This section encompasses any type of activity that deceives the consumer. Any violation of section 17.46 of the DTPA is actionable under article 21.21, section 16 of the Insurance Code. *Id.*

55. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 132 (Tex. 1988)(legislature mandates DTPA and Insurance Code to be construed liberally to promote remedial purpose).

56. *See id.* at 134-35 (article 21.21-2 does not provide private cause of action but definitions may be incorporated into the rules and regulations of the Insurance Board); TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981)(prohibits insurer from engaging in unfair settlement practices). Section 2(d) of this article provides that "not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear" is one of the acts which constitutes an unfair claim settlement practice. *Id.*

57. *See Vail*, 754 S.W.2d at 135 (*Arnold v. National County Mutual* decision determined insurer had duty to process insurance claim in good faith).

58. *See id.* (*Aranda v. Insurance Co. of North America* held duty of good faith breached when claim not promptly paid once liability established).

practice.[59] Based upon these decisions, an insurer's failure to process a claim when liability is reasonably clear is a breach of the duty of good faith.[60]

Dissenting, Justice Gonzalez stated that in order for the majority to find a private cause of action, it had to resort to a "tortured reading of the DTPA and Insurance Code."[61] Justice Gonzalez reasoned that, had the legislature intended to create a private cause of action, it would have acknowledged this intention in the act's legislative history and would have provided a specific provision in the respective codes.[62] The dissent further disagreed with the court's failure to recognize the decision in *Chitsey* which held, in part, that a "determination of law" which creates a cause of action under DTPA or Insurance Code must be determined by a state agency or possibly by legislative authorization.[63] Because the *Chitsey* decision could not be distinguished, Justice Gonzalez found that the Vails had no cause of action.[64]

The Texas Supreme Court, in reaching its decision in *Vail*, did not read

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59. *See id.* The prior holdings in *Aranda* and *Arnold* are determinations that lack of good faith by an insurance company in the processing of a claim is an unfair act or practice. *Id.* These holdings are determinations "pursuant to law" that an insurer who fails to process a claim in good faith is engaging in deceptive or unfair practices. *Id.*; *see also* Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 212 (Tex. 1988)(duty of good faith and fair dealing arising under common law and applied to contracts equally applicable to insurance contracts); Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987)(duty of good faith and fair dealing breached when no reasonable basis for insurer to deny claim or delay payment).

60. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 135 (Tex. 1988)(holdings in *Aranda* and *Arnold* established duty of good faith and duty breached by failing to pay claim promptly).

61. *Id.* at 138 (Gonzalez, J., dissenting) (cause of action found only through tortured reading of DTPA and Insurance Code).

62. *Id.* (legislature would have created private cause of action in specific section of DTPA or Insurance Code).

63. *See Vail*, 754 S.W.2d at 138-39 (Gonzalez, J., dissenting). Justice Gonzalez found several contradictions. *Id.* The insurance company's refusal to pay the claim must be shown to be a frequent occurrence to indicate that it is a general business practice before a claim would have been allowed in Chitsey. Prohibited conduct is to be determined by law before a cause of action can be established. A jury determination that the conduct is prohibited is not a valid determination of law. The determination must be made by a state agency or even reserved solely for the legislature. The majority in *Vail* now had the power previously reserved for that state agency or legislature. *Id.* at 139; *see also* Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 643 (Tex. 1987)(rejected recovery under article 21.21 since actions not committed with "frequency"). Court determined findings of conduct must be frequent to be recoverable. *Id.* The duty of good faith and fair dealing are not recognized. *Id.* at 643-44. The court did, however, allow recovery under breach of contract or tort. *Id.* at 644.

64. *See Vail*, 754 S.W.2d at 139 (Gonzalez, J., dissenting). No cause of action was stated by Vail under sections 17.50(a)(4) and 16(a) of the Insurance Code. *Id.* at 139. In addition, to establish an unfair claim settlement practice, 21.21-2, frequency must be proven to elevate the claim to an unfair settlement practice. *Id.* at 138-39.

the provisions of the DTPA and the Insurance Code in a "tortured manner" as the dissent claimed, but rather in the manner intended by the legislature—to provide consumers an adequate remedy.[65] The goal of the DTPA is to provide adequate remedies to an aggrieved consumer and, therefore, a broad interpretation of the act is allowed by the courts to provide consumers this remedy and deter the continuance of deceptive practices.[66] This remedy has now been extended to first-party claims against insurance companies where previously only an administrative remedy had been allowed.[67] The dissent erroneously claimed the majority had not only misread the DTPA but also contradicted a recent supreme court decision.[68] Careful review,

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65. *See* TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 1987)(section provides for DTPA to be liberally construed to protect consumers by providing adequate and economical remedies). Purpose of DTPA's treble damage provision is to encourage individuals to bring suit which will reduce the need for public enforcement. *See* Pennington v. Singleton, 606 S.W.2d 682, 690 (Tex. 1980). The legislature also recognized that consumers were faced with high costs in order to litigate, these costs being time and money. *Id.* The extra damage recovery was therefore provided to give incentive to consumers to pursue their claims. *Id.*; *see also* Woo v. Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)(DTPA resulted from inadequate common law remedies and DTPA's remedies are in addition to any other remedies available under law); Hill, *Introduction to Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 614 (1977)(obvious answer to problem of high litigation cost was to provide treble damages which would encourage private redress of grievances).

66. *See* Woods v. Littleton, 554 S.W.2d 662, 670-71 (Tex. 1977)(legislative intent of DTPA to encourage consumers to seek compensation and deter unscrupulous sellers from employing deceptive practices); McDaniel v. Dulworth, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ)(DTPA to provide effective relief for consumers who otherwise would not sue except for prospect of treble damages and further legislative intent to encourage redress by consumers and deter unscrupulous practices); *see also* Hill, *Introduction to Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 614 (1977)(consumers encouraged to litigate grievances through DTPA's lightening of burden of proof and recovery of multiple damages plus court costs and attorney's fees).

67. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 136 (Tex. 1988)(supreme court granted cause of action under DTPA for unfair claims settlement practices resulting from mishandling post-loss claim). *But see* Lone Star Life Ins. Co. v. Griffin, 574 S.W.2d 576, 580 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.)(private cause of action not granted to individual harmed by unfair settlement practice). The legislature's remedy for an individual injured by unfair claim settlement is art. 21.21-2. *Id.* If the State Board of Insurance determines such a violation occurred it has the power to stop the practice through issuance of cease and desist orders. *Id. See generally* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 56 (Supp. 1988)(private cause of action may be maintained under DTPA and Insurance Code for *any* conduct prohibited by Insurance Code, by rules or regulations, or by law as unfair or deceptive).

68. *See Vail*, 754 S.W.2d at 138 (Gonzalez, J., dissenting) (claimed majority opinion contradicted *Chitsey* since *Chitsey* required prohibited conduct be determined by legislative authority and majority was now usurping that authority). *But see Vail*, 754 S.W.2d at 135 (majority did not rely on jury finding, as disapproved in *Chitsey*, but rather relied on two previous supreme court decisions).

however, shows that the previous decision is distinguishable.[69] Had the Texas Supreme Court not provided a private remedy in this case, the administrative remedy of article 21.21-2 would not have offered an enhanced supervision of the insurance industry, but instead undercut the DTPA's intent to encourage private redress.[70] This redress, while serving as a deterrent, is not unlimited and therefore protects the insurance industry from unfounded claims.[71]

By promoting the Texas legislature's intent, the Texas Supreme Court is in accord with numerous decisions providing for a broad interpretation of the DTPA to provide relief for injured consumers.[72] A broad interpretation of the DTPA is necessary due to human ingenuity in creating loopholes in the DTPA's provisions and allowing the same deceptive acts and practices to continue without consequence.[73] These loopholes prompted the legislature

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69. *Compare Vail*, 754 S.W.2d at 130-31 (Vail's purchased insurance, filed claim and denied recovery for no valid reason) *with* Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 642 (Chitsey misrepresented information to insurer and was offered settlement which he refused).

70. *Compare* TEX. INS. CODE ANN. art. 21.21 (Vernon Supp. 1988)(purpose to regulate insurance industry by defining and prohibiting unfair trade practices) *with* TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981)(further defines acts or practices which are unfair or deceptive acts). *See also* Unfair Claim Settlement Practices Act, ch. 319, § 1, 735 Tex. Gen. Laws 1973. (legislature amended chapter 21 of insurance code to include this act). The provisions of art. 21.21-2 are not to reduce or eliminate the other available remedies to the Insurance Board and are to be cumulative to the existing law. *Id.* at 739; 19 J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 10557, 635-636 (rev. ed. 1982)(clearly erroneous not to give private individual cause of action even though insurance commissioner had power to enjoin unfair acts or practices); *see also* Pennington v. Singleton, 606 S.W.2d 682, 690 (Tex. 1980)(purpose of DTPA to encourage litigation and deter violations thereof).

71. *See* TEX. INS. CODE ANN. art. 21.21, § 16(c) (Vernon Supp. 1988)(groundless action brought in bad faith or to harass results in plaintiff paying costs).

72. *See, e.g., Pennington*, 606 S.W.2d at 686 (legislature created private action to provide consumers with incentive and method to discourage deceptive trade practices). In addition, a broad interpretation of section 17.46 is warranted because of human ingenuity to continue in such deceptive acts and practices without violating the DTPA. *See id.* at 688. The legislature's express purpose for the DTPA was to protect consumers and therefore would not allow it to be circumvented by those who devised new loopholes. *Id.*; Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 189 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(purpose of DTPA to protect consumer and provide efficient and economical procedures to secure this protection); Woo v. Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)(DTPA's intent is for injured plaintiff to recover greatest amount of damages—this serves dual purpose of Act which is to encourage consumers to litigate grievances and deter unlawful conduct); McDaniel v. Dulworth, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ)(legislative intent to encourage remedies by consumers deterring unscrupulous sellers through treble damage awards).

73. *See Pennington*, 606 S.W.2d at 688 (because of human inventiveness in engaging in misleading or deceptive conduct, broad interpretation of DTPA is warranted and caused legislature to initially provide consumers with action under "catch-all" provisions of § 17.46); *see*

to structure the DTPA's provisions loosely to encompass more areas and to allow some provisions to overlap thereby preventing circumvention of the express purpose of the DTPA.[74] The Vails themselves needed the protection of the DTPA since the insurance company wrongfully denied their claim on a pretense of arson when in fact the Vails were only trying to collect what was rightfully theirs.[75] Therefore, because this intent to protect the consumer and encourage litigation is well-founded,[76] a "tortured reading" would have resulted if the Texas Supreme Court had not allowed the Vails a private cause of action when Texas Farm engaged in its deceptive acts and practices.[77]

The Texas Supreme Court, in allowing a first party claim against an insurance company, is finally granting relief which had previously been available to most other insured individuals but not to first party claimants.[78] Causes of actions are available to persons when false representations are made to them regarding their insurance coverage[79] and are also available to persons

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also D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION ix (2d ed. 1983)(DTPA amended in each legislative session since 1973 indicating need for legislature to close various loopholes).

74. *See Pennington*, 606 S.W.2d at 688 (overlapping of DTPA's provisions may occur as result of broad interpretation given to violations resulting under section 17.46).

75. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 131 (Tex. 1988)(Texas Farm refused to settle claim after their liability reasonably clear).

76. *See, e.g.*, Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 189 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(purpose of DTPA to protect consumers by providing efficient and economical ways to consumer to litigate claims for unfair, misleading, or deceptive acts or practices); *Woo*, 565 S.W.2d at 298 (dual purpose of DTPA to encourage litigation which will in turn deter unfair and deceptive conduct); McDaniel v. Dulworth, 550 S.W.2d 395, 396 (Tex. Civ. App.—Dallas 1977, no writ)(legislative intent to encourage consumers to bring suit thereby deterring unscrupulous sellers from persisting in deceptive or unfair conduct).

77. *See* Woods v. Littleton, 554 S.W.2d 662, 665 (Tex. 1977)(court should look diligently for legislative intent). A court must keep in mind at all times when interpreting law, the legislative intent—what the old law was, what the evil to be prevented is, and what remedy is to be provided; and must construe the act accordingly rather than construe the statute by the literal meaning of the words used. *Id.* at 665; *see also* City of Mason v. West Texas Util. Co., 150 Tex. 18, 26, 237 S.W.2d 273, 278 (1951)(aim and purpose of court's interpretation of law is to ascertain and enforce legislative intent, not to defeat, thwart, or nullify purpose).

78. *See, e.g.*, Kennedy v. Sale, 689 S.W.2d 890, 891-92 (Tex. 1985)(employee for whom insurance purchased allowed recovery); Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 603 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)(insured allowed recovery for mishandling of third party claim); Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 191 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(cause of action granted to insured when policy coverage misrepresented).

79. *See Dairyland County*, 578 S.W.2d at 188 (recovery allowed where Plaintiff told car insurance would be renewed when in fact, insurance company let policy expire); *see also* Aetna Casualty and Sur. Co. v. Marshall, 724 S.W.2d 770, 771 (Tex. 1987). *Marshall* arose under a worker's compensation claim where the insurance company misrepresented the coverage and

whose third party claims are improperly handled.[80] Using these decisions as a foundation, the court merely follows precedent by granting persons whose first-party claims are denied a more powerful judicial remedy.[81] The only remedy previously provided under the Insurance Code was a cease and desist order when the insurance company's conduct was found to be "frequent."[82] Recognizing the unequal bargaining power between the insurer and insured,[83] the court granted the consumer, who pays premiums to re-

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medical benefits to be received. *Id.* The Texas Supreme Court found that misrepresentations of this type were just the sort of conduct which give rise to actions under the provisions of the DTPA and Insurance Code. *Id.* at 772; *Kennedy*, 689 S.W.2d at 891-92 (DTPA expanded to provide coverage to employee for whom coverage had been purchased by employer); McCrann v. Klaneckey, 667 S.W.2d 924, 926 (Tex. App.—Corpus Christi 1984, no writ)(plaintiffs wanted to purchase insurance and although never received actual coverage, were allowed recovery for misrepresentation even though never actually acquired good or service).

80. *See, e.g.*, G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, opinion approved)(landmark case which allowed third-party claim liability); Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 605-06 (Tex. App.—Tyler 1984, writ ref'd n.r.e.)(allowed third-party liability); *see also* Kreisler, *A Survey of Insurance Litigation Under the Texas Deceptive Trade Practices Act*, 18 TEX. TECH L. REV. 177, 195 (1987). The importance of the *Kelly* decision is that it does away with the insurance industry's misconception that post-loss misconduct is not actionable under the DTPA section 17.50 and the Insurance Code through art. 21.21. *Id.* at 195. The *Kelly* decision also allowed treble damages for a decision arising under a *Stowers* cause of action. *Id.*

81. *See, e.g.*, *Allstate Ins. Co.*, 680 S.W.2d at 605-06 (third-party liability settled which allows cause of action for post-loss claims mishandling); *Dairyland County Mut. Ins. Co.*, 578 S.W.2d at 188 (cause of action found when misrepresentation made as to insurance coverage); *see also* Kreisler, *A Survey of Insurance Litigation Under the Texas Deceptive Trade Practices Act*, TEX. TECH L. REV. 177, 209-10 (1977)(number of cases have found post-loss conduct actionable under DTPA for ample authority for consumer to have first-party action).

82. *See* TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981). Section (2) of this article lists the prohibited practices which are considered unfair claim settlement practices. *See id.* In addition, these acts must be committed with "frequency" to be an unfair claim practice. *Id.* The term "frequency" is left undefined. *Id.* Section 6(a) provides the penalties which are assessed for violations of this article. *See id.* It provides that upon the State Board of Insurance's finding that a violation of this act has occurred, it shall issue a cease and desist order to the insurance company directing it to halt the unlawful practices. *Id.*; *see also* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 138 (Tex. 1988)(Gonzalez, J., dissenting). Justice Gonzalez first claims that the majority is making a false interpretation of article 21.21-2 by not requiring "frequency" to be a requisite element of the acts defined in this section. *Id.* at 138. Later, he claims that "frequency" may not be a necessary element of the actual act but is only a requirement to graduate the act to an unfair claim settlement practice. *Id.* at 138-39. It would appear that the dissent is agreeing with the majority interpretation that 21.21-2 can be used only for definitional purposes. *See id.*

83. *See* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987)(duty of good faith and fair dealing applies to insurers). The *Arnold* decision recognized that there is a special relationship which is a product of the unequal bargaining power of the parties in the insurance context. *Id.* Because of this unequal nature, insurance companies could take advantage of a claimant's misfortune and arbitrarily deny or delay payment of a claim since the only penalty they would incur would be interest on the amount owed. Since

ceive the coverage, some leverage to recover a valid claim.[84]

The dissent would not have allowed the individual to recover in this case, claiming the majority had misread the DTPA and Insurance Code[85] and also ignored a recent Texas Supreme Court decision in *Chitsey*.[86] The dissent's use of *Chitsey* can be distinguished upon two bases: 1) through an examination of the facts,[87] and 2) the provisions of DTPA and Insurance Code used in each case.[88] First, the plaintiff in *Chitsey* differs from the Vails in that Chitsey made some misrepresentations to the insurance company concerning the property.[89] In addition, the insurance company offered a settlement to Chitsey which the insured refused before filing suit.[90] In contrast,

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the company has exclusive control over how the claims are evaluated, processed, and denied, the *Arnold* court implied a duty of good faith and fair dealing. The court held that a cause of action existed under good faith and fair dealing when there was no reasonable basis for denying or delaying the payment of the claim. *Id.*; *see also* Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 212 (Tex. 1988)(decision relied upon language of *Arnold* and recognized special relationship arising under insurance contracts and inequality of bargaining power).

84. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 136 (Tex. 1988)(incongruous to deny protection to individual who pays premiums from recovery where claim wrongfully denied). Premium paying individual entitled to DTPA's protection because barring this cause of action would contradict the remedial purpose of both DTPA and Insurance Code. *Id.*; *see also Arnold*, 725 S.W.2d at 168 (exemplary damages as well as damages for mental anguish allowed for breach of good faith and fair dealing); Woo v. Southwestern Acceptance Corp., 565 S.W.2d 290, 298 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)(injured plaintiff is to recover greatest amount of damages in order to deter unfair conduct).

85. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 138 (Tex. 1988)(Gonzalez, J., dissenting)(majority resorted to reading DTPA and Insurance Code in tortured manner because nothing in legislative history suggests what majority allowed in decision).

86. 738 S.W.2d 641, 643 (Tex. 1987)(rejected cause of action under article 21.21 of Insurance Code and did not recognize good faith and fair dealing). The jury in this decision first determined that the insurance company had committed an unfair act. *Id.* The supreme court, however, rejected the argument that the jury determination was a determination by law which created the cause of action under article 21.21. It also rejected the claim that language of Board Order 41060 provided a cause of action because Chitsey failed to prove that the act or practice was committed frequently so to establish a business practice. *Id.* Lastly, the supreme court disregarded the jury's finding that the insurance company had violated its duty of good faith and fair dealing as established in *Arnold* by allowing recovery under either a breach of contract or tort theory. *Id.* at 644.

87. *Compare* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 130-31 (Tex. 1988)(Vails' claim denied for no valid reason) *with* Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 641-42 (Tex. 1987)(insured refused insurers settlement offer and filed suit).

88. *Compare Vail*, 754 S.W.2d at 133-34 (one basis of recovery used section 16 of art. 21.21 of Insurance Code by incorporating Board Order 41454 which requires proof of more than one act) *with Chitsey*, 738 S.W.2d at 643 (based recovery on use of Board Order 41454 which requires proof of more than one act).

89. *See Chitsey*, 738 S.W.2d at 642 (jury found plaintiff made misrepresentations concerning his plans to insurance company regarding property).

90. *See id.* (insurance company sent adjuster and homebuilder who valued claim at less than full policy amount).

the plaintiffs in *Vail* did not make any misrepresentation to Texas Farm and were never offered a settlement at any time.[91] Secondly, *Vail* and *Chitsey* differ in the provisions on which each respective plaintiff relied in asserting a cause of action under the DTPA and Insurance Code.[92] The plaintiff argued in *Chitsey* that article 21.21, section 16(a) of the Insurance Code was violated by conduct which the Insurance Board had declared to be an unfair or deceptive act or practice.[93] The plaintiff in *Chitsey* further relied on a board order[94] which prohibited any practice "determined by law" to be an unfair or deceptive act or practice.[95] The court held that a jury determination was not a determination of law, and instead required a finding by a state agency or possibly even a legislative determination to create a cause of action.[96] Not only was the jury determination not sufficient to create the cause of action, but *Chitsey* also relied on an additional Board Order requiring the insurer to have frequently acted deceptively.[97] In contrast, the *Vail* cause of action did

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91. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 131 (Tex. 1988)(home burned during term of policy and was total loss, allegation of arson had no validity). Insurance company first would not pay the claim arguing that they had not received an adequate contents list and later changed basis of denial to an unfounded arson claim. *Id.*

92. *Compare Vail*, 754 S.W.2d at 132-33 (one basis of recovery focused on using section 16 of article 21.21 of Insurance Code by incorporating Board Order 18663) *with* Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 643 (Tex. 1987)(basis of recovery also used section 16 of article 21.21 but relied on Board Order 41454).

93. *See Chitsey*, 738 S.W.2d at 642-43 (although not listed in section 17.46 as unlawful trade practice or contained in "laundry list" of section 17.46, Chitsey claimed insurer's failure to use due diligence in determining his loss was practice declared by Board of Insurance as unfair method of competition or deceptive or unfair practice).

94. *See Chitsey*, 738 S.W.2d at 643. The plaintiff argued that the insurance company's failure to use diligence in determining his loss was a violation of the Insurance Code, State Board of Insurance Code Order 41060. *Id.* Part (b) of the Order states that no person shall engage in conduct which is determined "pursuant to law" to be an unfair or deceptive practice in the Insurance industry. *Id.*

95. *See* Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 643 (Tex. 1987)(court holding correct role for jury is to determine facts, not matters of law, and decisions as to determinations of law should be made by state agency or legislature).

96. *See Vail*, 754 S.W.2d at 133 (Board Order 18663, section 4 permits cause of action when practice complained of *defined* by Insurance Code or other rules or regulations or determined by law to be unfair practice). In article 21.21-2 specific acts are defined which are unfair claim settlement practices. *Id.* at 134. These definitions when incorporated with Board Order 18663 provide a cause of action since the definition is being employed, not the sanctions of 21.21-2. *Id.* Alternatively, a cause of action may be found under this order if the act has been determined pursuant to law to be an unfair claims settlement. *Id.* at 133. While recognizing that a jury determination does not qualify as a determination of law, the majority in *Vail* relied on two prior decisions as determinations pursuant to law. *Id.* at 135; *see also* TEX. INS. CODE ANN. art. 21.21-2, § 2(d) (Vernon 1981)(section defines unfair practice as claimed in this cause of action).

97. *See Chitsey*, 738 S.W.2d at 643 (incorporates Board Order 41454 through language of Board Order 41060). Under Board Order 51565, however, the unfair claim practice had to be

not require a determination of law, but rather was based on specific language contained in a statute as an unfair claim settlement practice.[98] The Texas Supreme Court granted a cause of action based upon established law[99] and did not rely upon the jury to make a determination of law as was the case in *Chitsey*.[100] Therefore, taking into consideration the differences discussed, the decision in *Chitsey* is not contradicted by the *Vail* decision, as Justice Gonzalez claims, but rather is distinguishable.[101]

In *Vail*, the Texas Supreme Court furthered the remedial goals of the legislature by providing remedies for a first-party claim under the DTPA and Insurance Code.[102] Adhering to this remedial goal, article 21.21 of the Insurance Code begins with the stated purpose to regulate the trade practices within the insurance industry while providing a private cause of action to individuals harmed by deceptive acts or practices.[103] Further, article 21.21-2 enhances article 21.21 because it provides for continued monitoring of the insurance company who has had frequent claims filed against it.[104] Had the

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committed with frequency which would establish this as a general business practice of the insurance company. *Id.* Because *Chitsey* was unable or failed to prove this frequency requirement, the court denied recovery. *Id.*

98. *See Vail*, 754 S.W.2d at 135 (Board Order relied upon in this decision granted cause of action for practices which have already been determined pursuant to law to be unfair practices and courts, who readily decide matters of law, can thus make determination whether act in question was unfair or deceptive).

99. *Id.* (decisions in *Arnold* and *Aranda* determine conduct considered unfair or deceptive and are determinations of law).

100. *See* Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 643 (Tex. 1987)(jury found insurance company failed to use due diligence in determining amount of loss but determination cannot be substituted for declaration of what constitutes prohibited conduct).

101. *Compare* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 131-32 (Tex. 1988)(claim denied for no apparent reason, never offered settlement by insurance company, and cause of action based on specific provisions of DTPA and Insurance Code) *with* Chitsey v. National Lloyds Ins. Co., 738 S.W.2d 641, 642-43 (Tex. 1987)(plaintiff also found to have made misrepresentation, was offered settlement, and based cause of action on unwritten provision of Insurance Code requiring determination of law and on provision requiring frequency).

102. *See* Woods v. Littleton, 554 S.W.2d 662, 670 (Tex. 1977)(DTPA enacted to provide consumers methods and incentives to deter deceptive trade practices); *see also* Melody Homes Mfg. Co. v. Barnes, 741 S.W.2d 349, 353 (Tex. 1987). The court recognized the shift from economy dealing primarily in goods to one now more service oriented. *Id.* Public policy mandated a change to protect consumers so the court and the legislature interpreted the theory of implied warranty to be applied to products, goods, and new houses. The court recognized in *Melody* that it can best serve the law when it can disregard an old rule and replace it with one society needs. *Id.* at 354.

103. *See* TEX. INS. CODE ANN. art. 21.21 (Vernon Supp. 1988). The Act's purpose is to regulate practices of the insurance companies. *Id.* This purpose is to be fulfilled by defining or providing the method by which unfair or deceptive acts can be determined. This article is also intended by the legislature to be liberally construed. *Id.*

104. *See* TEX. INS. CODE ANN. art. 21.21-2 (Vernon 1981)(if insurance company out of line, State Board of Insurance can require it to file period reports, can hire investigators to

legislature not intended to protect the individual and intended only for actions to be filed by the State Board of Insurance, it certainly could have expressed such intent by language in the statute that would clearly indicate a bar to private causes of action.[105]

Finally, by encouraging consumers to litigate, the legislature will actually decrease the number of suits brought by encouraging settlement through the threat of treble damages.[106] The threat of treble damages, however, is not without limits.[107] The legislature recognized the potential abuse which could be made of this section and inserted appropriate safeguards to protect the insurance companies.[108] Therefore, both the consumer and insuror are protected by providing relief to injured plaintiffs and limiting this to claims of consumers actually harmed.[109]

In *Vail*, the court has settled the question of whether an individual has a

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enforce, can hold hearings to review allegations, and can issue cease and desist orders ordering unlawful practice to stop); *see also* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 134-35 (Tex. 1988)(21.21-2 requires frequency of acts before allowing Insurance Board to impose sanction).

105. *See* Mobile County Mut. Ins. Co. v. Jewell, 555 S.W.2d 903, 909-10 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.). At one time article 21.21, section 16 of the Insurance Code was not applicable to county mutual insurance companies. *Id.* at 909. The legislature expressed clear intent by reenacting the exemption so to prevent county mutual insurance companies from being subjected to the DTPA. *Id.* at 910. In 1981, this exemption was withdrawn by the legislature. *See* D. BRAGG, P. MAXWELL & J. LONGLEY, TEXAS CONSUMER LITIGATION 175 (2d ed. 1983).

106. *See also* Pennington v. Singleton, 606 S.W.2d 682, 690 (Tex. 1980)(purpose of treble damages provision in DTPA is to encourage private litigation and deter violations of the DTPA).

107. *See* TEX. INS. CODE ANN. art. 21.21, § 16(c) (Vernon Supp. 1988)(if action brought to harass or is groundless and brought in bad faith, defendant awarded attorney's fees and court costs). TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 1987)(identical provision as in insurance code providing defendant recovery of attorney's fees and court costs for actions in bad faith, harassment or groundless); *see also* TEX. BUS. & COM. CODE § 17.505(d) (Vernon 1987)(if offer of settlement rejected by consumer and damages found by court substantially same consumer may not recover more than offer or court's award, whichever less).

108. *See* TEX. INS. CODE ANN. art. 21.21, § 16(c)(Vernon Supp. 1988)(defendant prevails if action groundless, in bad faith or for harassment); *see also* TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 1987)(identical provision as in insurance code providing defendant recovery of attorney's fees and court costs for actions in bad faith, harassment or groundless); Pope v. Darcy, 667 S.W.2d 270, 273 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)(case need not be prosecuted to conclusion before attorney's fees awarded for suit brought under DTPA in bad faith). The court in *Pope* further explained that it was not error for the trial court to decide the suit was groundless. *See id.* at 274. In an action brought under section 17.50(c) of the DTPA, the jury decides the issues of harassment and bad faith, while the judge determines if the suit is groundless. *Id. See generally*, Leikam & Corbin, *Woods v. Littleton: Consumerism Comes of Age*, 18 S. TEX. L.J. 477, 490 (1977)(groundless finding must be by court but not affirmative defense that has to be plead and proved).

109. *Id.*

private cause of action in a first-party claim. The individual who pays premiums in order to obtain and retain coverage now has a remedy against the insurance company that wrongfully denies claims, beyond suing for the premium plus interest and attorney's fees, or to seek a cease and desist order issued by the State Board of Insurance if their conduct is proven as "frequent." The insurance company and the insured are not on equal bargaining terms because the insured has very few options as to the contents of a standard form insurance policy. Since the DTPA's purpose is to protect the consumer and deter deceptive or unfair acts and practices, a private cause of action given to a first-party claimant, with the prospect of treble damages, will enhance the DTPA's deterrence objective. Faced with this possibility, more insurance companies might be willing to settle before trial, thus eliminating the flood of litigation which some might see as resulting from this decision.

Gloria F. Christmas