



Legal Beat

By MICHAEL SEAN QUINN

Agents Get a Big Courtroom Stick

The cesspool of vanishing premium life insurance has now produced some very good law, but it could have been even better. On July 1, 1999, a unanimous Texas Supreme Court decided *Crown Life Insurance Company v. Casteel*, a case which firmly trounced an insurance company and established a worthy principle of law favorable to insurance agents. But the court failed to apply that principle with discernment and legally required generosity.

Just the facts

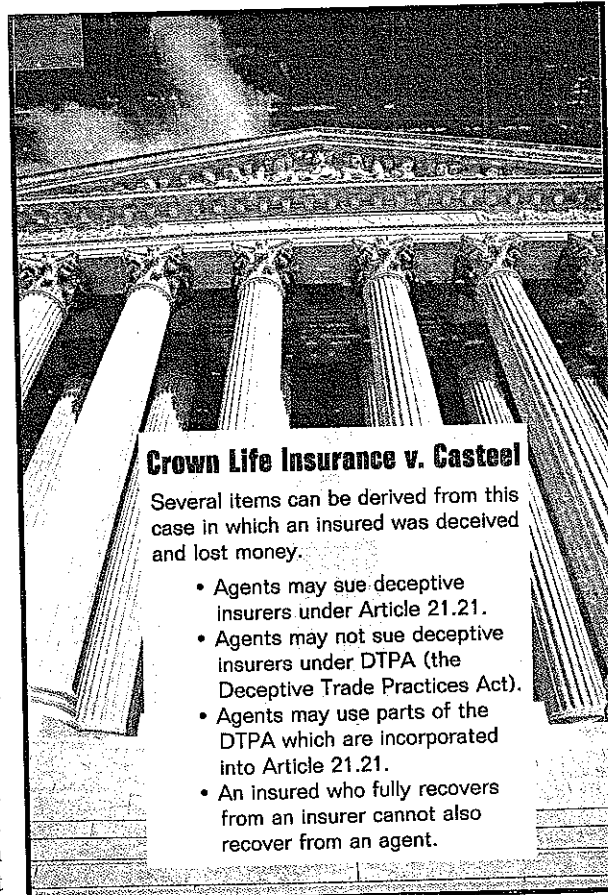
The facts that gave rise to this litigation are relatively simple. A couple bought a variant of vanishing premium life insurance through Casteel, an Austin-based agent for Crown Life. It provided that large premiums be paid over a short period of time. The company (apparently) represented that the premiums would shortly diminish and then vanish, because policy dividends would be reinvested and pay the premiums. The routine was that Casteel obtained data from applicants for the insurance; Crown prepared individualized packets of sales materials; and the agent then made a pitch.

A couple bought a \$5 million policy. The Crown agent told them that the premiums would vanish after \$91,520. The insured subsequently discovered that the premiums would never vanish and could add up to \$800,000. Astonishment yielded to disappointment and then to rage.

The ensuing lawsuit

The insureds sued Crown and Casteel on a variety of theories including the Texas Deceptive Trade Practices Act (DTPA) and Article 21.21 of the Insurance Code. Casteel filed a cross action against Crown based in part on Art. 21.21. The Supreme Court focused on these two statutory claims.

The jury found for the insureds against both Crown and Casteel. It found that both had engaged in unfair or deceptive acts or



Crown Life Insurance v. Casteel

Several items can be derived from this case in which an insured was deceived and lost money.

- Agents may sue deceptive insurers under Article 21.21.
- Agents may not sue deceptive insurers under DTPA (the Deceptive Trade Practices Act).
- Agents may use parts of the DTPA which are incorporated into Article 21.21.
- An insured who fully recovers from an insurer cannot also recover from an agent.

practices which were the producing causes of damages. It held Crown 99 percent responsible and the agent 1 percent responsible. It found Crown to have acted knowingly; it found the agent to have acted without knowledge. (Keep these facts in mind. They are crucial.)

The jury also found in favor of Casteel on its cross action against Crown. It determined that Crown knowingly engaged in false, misleading, unfair, or deceptive acts or practices and was the producing cause of damage for Casteel. The jury awarded Casteel \$400,000 for income he had lost in the past, \$1 million for income he would lose in the future, \$6 million for mental anguish he had experienced in the past, and \$100,000 for mental anguish he would endure in the future. In addition, the jury awarded Casteel attorney's fees in the amount of 40 percent of his recovery.

If this entire sum were awarded by judgment, Casteel would collect \$10.5 million from Crown, plus interest. That's a lot of money, especially for someone who was not completely innocent. One wonders if it was more money than the insureds eventually received.

After the trial, Crown settled with the insureds. As part of the settlement, the insureds assigned all of their rights against Casteel, the agent, to Crown, so that Crown

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stood in the insureds' place against Casteel. Following this settlement, Crown moved for judgment notwithstanding the verdict on Casteel's claims against it, and the trial court granted its motion. The trial court also held that Casteel did not have standing to sue under Art. 21.21 of the Insurance Code or under the DTPA. That court then dismissed the insureds' claims against Crown with prejudice, since those claims had been settled.

The only open claim, then, was the insureds' claims against Casteel. The trial court, incredibly, rendered judgment on those claims. A not-so-innocent Crown standing in the shoes of the insured, thus obtained a \$1.4 million judgment against the relatively innocent agent.

Obviously, this is a profoundly unjust result. Indeed, it is outrageous that Crown engaged in such bold aggression, after a jury had found that its treatment of its insured was knowingly unfair or deceptive. What better confirmation of the jury's verdict of insurer treachery could one want than Crown's subsequent treatment of the very agent when the jury had found to have been used as an unwitting tool?

In their book, "The Moral Compass of the American Lawyer: Truth, Justice, Power and Greed" (1999), California lawyers and ethicists Richard Zitrin and Carol Langford suggest that at least some insurance companies really are in the business of litigation. I believe that observation certainly applies to Crown. It has proven itself a repeat player in Texas litigation involving denied claims, and an El Paso trial court once found Crown guilty of bad faith by summary judgment.

The appeal

The scandalous result Crown obtained against Casteel in the trial court obviously could not stand, and the Austin Court of Appeals set it aside. It found that the agent did have standing to sue the insurer under Art. 21.21 but that it did not have standing to sue under the DTPA, either directly or indirectly. (The indirect use of the DTPA through Art. 21.21 is at the heart of what the Supreme Court decided in this case. But more of this matter presently.)

In any case, the court of appeals reversed the judgment of the trial court against the agent in favor of Crown and rendered judgment that Casteel should take a judgment against Crown for his past and future lost earnings. The court of appeals also affirmed the trial court's setting aside the verdict of \$6.1 million for mental anguish damages; it said there was legally insufficient evidence to support it.

Crown petitioned the Supreme Court of Texas. The appeal raised three huge ques-

tions, which affect everyone in the insurance industry, and one narrower question which affected Casteel significantly and which will shape the technical aspects of some litigation in the future.

1. *DTPA Standing.* The first significant question is whether an insurance agent has standing to sue a carrier he represents under the DTPA. Standing to sue under that statute is restricted to consumers who have purchased goods or services. It follows immediately that Casteel does not have standing directly to sue under that statute. Insurance is a service, but he did not buy any insurance from Crown. Therefore, Casteel is not a consumer. This is a simple issue. It was correctly decided by both the Austin Court of Appeals and the Texas Supreme Court.

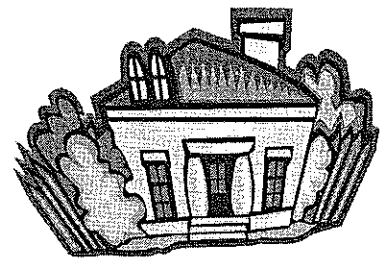
2. *21.21 Standing.* The second major question was whether Casteel, an agent, had standing to sue Crown under Art. 21.21, which prohibits unfair practices in the business of insurance. This statute is not restricted to consumers.

Section 16(a) of Art. 21.21 says this: "Any person who has sustained actual damages caused by another's engaging in an act or practice declared [elsewhere in] this Article to be...unfair or deceptive acts or practices in the business of insurance or in any practice specifically enumerated in a subdivision of [the DTPA] as an unlawful deceptive trade practice may maintain an action against the person or person engaged in such acts or practices."

Thus, the question before the Supreme Court in Casteel is whether an insurance agent qualifies as "any person" for the purposes of § 16(a) of Art. 21.21. Justice Greg Abbott, writing for a unanimous Court, held that insurance agents are "persons" for the purposes of § 16(a) and, hence, have standing to sue the insurance companies they represent. Thus, if an insurance company uses an agent to lie to a prospective insured, not only may the insured sue the insurer, but the agent may do so as well, if he has sustained injury and damages. This is a holding that is correct and of extraordinary significance.

3. *Indirect Standing.* Art. 21.21 contains a list of prohibited acts that may constitute the basis for a lawsuit. In addition, it incorporates a list of acts and practices from the DTPA. Thus, one suing under Art. 21.21 does not have to be a consumer to seek damages based upon some of the prohibitions contained in the DTPA. One must be a consumer to bring a lawsuit under the DTPA, but since a list of prohibited acts is imported into Art. 21.21, one does not have to meet the threshold standing requirement of being a consumer in order to use these sections indirectly, through Art. 21.21.

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There is a catch. There are 24 separate numbered items on the DTPA's list of prohibited acts or practices which Art. 21.21 incorporates. One of them specifically mentions consumers. Three more are triggered only if misrepresentations regarding "goods or services" are made. Those three key sections prohibit, in relevant part, the following:

- Representing that services [such as insurance policies] have characteristics or benefits which they do not have;
- Representing that the services [like insurance policies] are of particular stan-

dard, quality, or grade, if they are of another; and

- Advertising services [e.g., insurance policies] with the intent of not selling them as advertised.

Since the overall intent of the DTPA is to regulate transactions with consumers, the prohibited misrepresentations must be made to consumers. The *Casteel* Court inferred from this self-evidently true proposition that only consumers could bring suits based on these three subsections. *Casteel*, of course, was not a consumer. Therefore, said the

Supreme Court, he could not utilize these three sections. No agent, suing as an agent, can. This holding is a mistake.

At the same time, *Casteel* could sue Crown for "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law," another item in the DTPA list of prohibited acts or practices. The reason *Casteel* could sue on this last subsection, but not on the previous three, is because the word "services" does not appear in that last subsection.

The jury charge

The Supreme Court's tortured and hyper-technical reasoning about the significance of the word "services" had a dramatic impact on *Casteel's* claim, because of the logic of Texas trial procedure. In Texas, litigants have the right to have juries decide disputed facts. At the same time, juries do not decide who wins and who loses. Instead, they are asked rather broad factual questions. Judges

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lawyers know, is a
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decide who wins and who loses based upon the answers juries give. Questions put to juries by courts and the explanations of those questions must be correct.

In the *Casteel* case the trial court submitted a single broad factual question covering Crown's liability to *Casteel*. The question was probably worded something like this: "Did an unfair or deceptive practice of Crown produce *Casteel's* damages?" The court's charge to the jury then listed a series of unfair or deceptive practices. That list included improper components, such as the three listed previously as bullet points. In other words, the jury was asked to answer a single broad question. It could resolve that question against Crown on any one (or more) of the grounds set forth in the Court's charge. Unfortunately, several of those grounds were improper, said the Supreme Court. Thus, the jury could have answered the question against Crown based on an improper standard and hence upon improper grounds.

The Supreme Court found that this was harmful error, and sent Casteel's case back to the district court for a new trial. In other words, Casteel has ended up with no money in his pocket (so far) for injurious acts a decade old. At least Crown has to face another jury, which will certainly find out about much of its jury-acknowledged chicanery and many of its ill-considered shenanigans.

Critique

Casteel's case could have easily come out differently in the Supreme Court. The very first section of Art. 21.21 states that the statute shall be "liberally construed and applied to promote its underlying purposes[.]" The underlying purpose, after all, is to eradicate unfairness and deception in the business of insurance. Given this foundation, was there a valid way for the Supreme Court to vindicate Casteel's claims?

Section 16(a) of Art. 21.21 provides standing to bring a lawsuit to any person who has sustained actual damages caused by anyone else's engaging in an unfair or deceptive practice prohibited by parts of the DTPA. Section 16(a) does not say that persons with standing must be the consumer or the ultimate person to whom misrepresentations are made.

Thus, it is consistent with § 16(a) that if A causes a DTPA-prohibited misrepresentation to be made to B which also causes actual damages to C, and that representation is in the business of insurance, then C has standing to sue A. This proposition is true even if C was A's unwitting tool in making the misrepresentation to B.

If this interpretation (which is certainly consistent with—if not mandated by—Art. 21.21's requirement that it be liberally construed) had been adopted, at least \$1.4 million of Casteel's claim would have been vindicated and the case would be over. The Austin Court of Appeals had the numbers right. The Supreme Court would like to believe that its decision limiting the incorporation of the DTPA by Art. 21.21 is stimulated, if not actually compelled, by precedent. It isn't.

Crown dethroned

As the Austin Court of Appeals before it had done, the Supreme Court fortunately made short work of Crown's disreputable attempt to subject Casteel to a money judgment, after Crown had fully settled with the insureds. The applicable rule, as all competent lawyers know, is a simple one: every litigant is entitled to one satisfaction only. Since the insureds had received full satisfaction from Crown, they could not get it again from the agent. The fact that the plaintiff-insureds had assigned their claim to Crown is completely irrelevant for

the purpose of applying the One Satisfaction Rule.

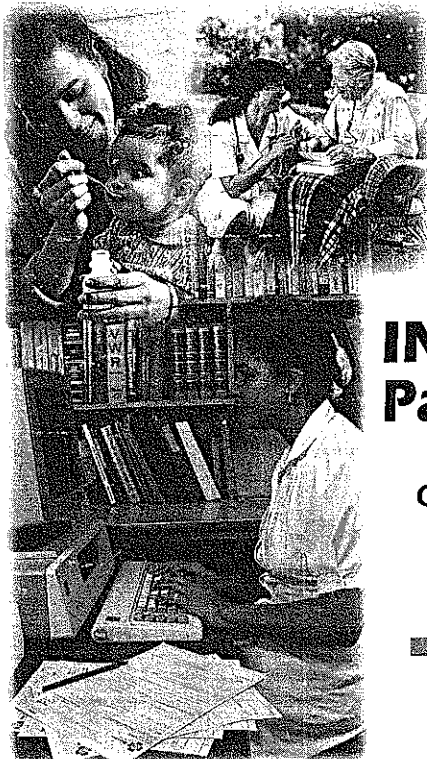
Conclusion

One can only hope that Crown has the savvy to settle with Casteel on appropriate terms. If that does not happen, one can only pray that a jury of the good citizens of Austin, Texas, will savage Crown just as the previous jury did. This is what Crown should expect. It is possibly what Crown deserves. Unfortunately, mental anguish is probably out of the case. Besides, not long ago the Supreme Court eliminated mental

anguish from legal malpractice cases. That rule might apply here, too.

A sensible company would get rid of this case. One suspects that Crown's distinguished lead counsel before the Supreme Court has told Crown exactly this. An honorable business litigant would take that advice. Given the obstinacy portrayed in the appellate reports, however, one wonders. ■

Quinn is a shareholder with Sheinfeld, Maley and Kay (Austin) and is currently teaching Insurance Law in the Law School at the University of Texas-Austin.



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