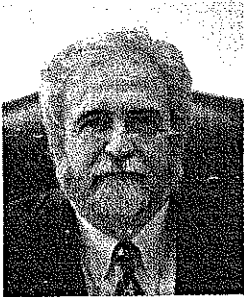


Article 21.55: Reason Prevails



BY MICHAEL SEAN QUINN

Non-duplication-of-benefit clauses in insurance contracts are valid and enforceable, as Texas courts have said several times.

For a generation, or so, courts around the country have thought that contract law was insufficient to regulate the claims conduct of insurance companies. Consequently, the common law of insurer bad faith has been created. As will happen from time-to-time, various state legislatures have agreed as is evidenced by the proliferation of state laws. As a result, statutory bad faith has been created.

In Texas, statutory bad faith mainly consists of three statutes: the Deceptive Trade Practices Act, Art. 21.21 of the Insurance Code, and Article 21.55 of the Insurance Code.

Article 21.55 regulates only first-party claims. One of its key provisions requires certain insurers to acknowledge claims within 15 days of its receipt of those claims. On May 10, 2001, in a decision, styled *Allstate v. Bonner*, a unanimous Texas Supreme Court construed Article 21.55 in a reasonable, eminently sensible, and principled manner.

I.

The facts were simple. Bonner bought personal auto insurance from Allstate. The policy included Uninsured Motorist (UM) coverage. She was slightly injured by an uninsured motorist in October 1997. Shortly thereafter, she filed a PIP claim for approximately \$1,800 in chiropractic bills.

Allstate acknowledged the claim and reduced it to approximately \$1,600. Thereafter, Bonner submitted a UM claim. Allstate received this claim on Dec. 15, 1997, but did not acknowledge it until Jan. 16, 1998.

Ultimately, Allstate refused the claim because the UM claim was smaller than the PIP claim and the insurance contract contained a non-duplication-of-benefits provision.

Bonner sued. The jury found that negligence of an uninsured motorist approximately caused the accident. It also awarded Bonner \$1,000 in compensation, as well as \$7,500 in attorneys' fees. Because of the non-duplication clause, the trial court rendered judgment that Bonner take nothing. It also declined to award her attorneys' fees or any costs taxed against her.

The court of appeals affirmed the take-nothing judgment, but it reversed the trial court on the point of attorneys' fees, and assessed costs against Allstate under Article 21.55.

Allstate petitioned the Supreme Court for review. Justice Greg Abbot wrote a short opinion for the unanimous court. It affirmed the district court, reversed the court of appeals and rendered judgment

that Bonner take nothing.

II.

Article 21.55 of the Texas Insurance Code regulates the prompt payment of claims and sets up a penalty system for tardiness. As part of the statutory system, § 6 requires insurers to acknowledge claims in a speedy manner. A "claim" is defined as "a first-party claim made by an insured . . . under an insurance policy . . . that must be paid by the insurer directly to the insured."

The statute then provides that insurers shall acknowledge the receipt of such claims not later than the 15th date after it receives notice of a claim. Section 6 provides an 18 percent per annum penalty plus reasonable attorneys' fees, "[i]n all cases where claims made pursuant to a policy of insurance and the insurer liable therefore is not in compliance with the requirements of this article."

The court summarized the elements a plaintiff-insured must prove to recover under 21.21 § 6:

- (1) There must be a claim under an insurance policy;
- (2) The insurer must be liable for the claim; and
- (3) The insurer must fail to follow at least one procedural provision of Article 21.55 with respect to that claim.

The second element requires that the insured be liable on the claim. In *Bonner*, Allstate stipulated that it had violated Article 21.55 by not sending an acknowledgment of her claim within 15 days of its receipt. It did not stipulate, however, that it was liable for the claim. Indeed, it denied that contention on the basis of the non-duplication clause from the of-benefits provision.

III.

The Supreme Court sided with Allstate. Insurance policies are contracts, said the court, as it has said many times before. To establish liability under a contract, an insured-claimant-plaintiff must prove that all applicable provisions of the insurance policy have been satisfied.

Non-duplication-of-benefit clauses in insurance contracts are valid and enforceable, as Texas courts have said several times. When that clause is applied to the facts of this case, Allstate would be liable under the policy only if the UM claim exceeded the PIP claim. Of course, it did not. Consequently,

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Element (2) of the plaintiff's case under Article 21.55 fails.

All of this is quite obvious. The only reason this case came to the Supreme Court is because the court of appeals made a mistake. The cynic might wonder if the court of appeals didn't deliberately make a mistake in order to provoke review by the Texas Supreme Court.

There is an interesting feature of this decision. It is one only lawyers could love. In cases where both sides seek damages from the other—where there are counter claims—a side which does not get any money can recover attorneys' fees.

The Supreme Court found that the counterclaim paradigm does not apply to non-duplication-of-benefits clause.

Suppose A sues B for \$50,000, and B sues A for \$40,000. Suppose both win. Now suppose that A's lawyers charged him \$10,000, while B's lawyers charged him \$30,000. In this case, each side would be awarded attorneys' fees assuming that B's attorneys' fees were reasonable, A would end up owing B \$10,000, because both sides would be awarded attorneys' fees. Thus, B would be awarded attorneys' fees even though his contract claim exceeded B's contract claim.

The Supreme Court found that the counterclaim paradigm does not apply to non-duplication-of-benefits clause. The reason is obvious. Allstate is not filing a counterclaim. The non-duplication-of-benefits clause is part of the insurance contract. If that clause is not satisfied, the insured has no right to recovery under the contract.

IV.

The most interesting issue under Article 21.55 remains to be decided. What is the scope of a first-party claim? Generally, terms under liability policies are treated as third-party claims, not first-party claims. But what about the duty to defend?

Many believe that requests for a defense under a liability policy constituted a first-party claim. This idea makes eminent sense. If so, would an insured's application to its liability insurer to provide a defense be covered by Article 21.55?

The answer is somewhat surprising. Such claims are probably not covered under most liability policies. This is because such claims are not directly payable to the insured. Instead, they are payable to the defense lawyers the insurer hires to represent the insured. Consequently, in a rather

subtle way, the definition of the term "claim" is not met.

V.

Many people will criticize this opinion upon the grounds that it represents a continuing effort by the Supreme Court to eviscerate the law of bad faith. Few ideas could be further from the truth.

What the Supreme Court has done in Bonner

is not only sound and sensible, but virtually dictated by the language of the statute. Any other result would have been both unreasoned and unprincipled. ■

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