

THE PROPER DEFENDANTS:
SUITS UNDER ARTICLE 21:14,
Garrison Contractors AND OTHER AVENUES

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THE PROPER DEFENDANTS:

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Garrison Contractors and Other Avenues

I. INTRODUCTION

Since the enactment of Insurance Code art. 21.21, there has been confusion about insurance company employees' potential liability to insureds for acts committed on behalf of an insurer — particularly during claims. For a time, Texas Supreme Court authority seemed to indicate that adjusters and other insurance company representatives did not ordinarily have personal liability to insureds. *Natividad v. Alexis*, 875 S.W.2d 695 (Tex. 1994). However, the recent case of *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.* 966 S.W.2d 482 (Tex. 1997), raises the possibility of personal exposure, a hammer certain to be raised by insureds' counsel during claim negotiations, and creates uncertainty as to the potential liability of agents, adjusters and other individuals.

This paper will explore the parameters of claims that might be brought against non-insurer Defendants, specifically agents and adjusters.

II. BACKGROUND

The causes of action available in Texas to an insured complaining of the insurer's practices in the business of insurance are: breach of contract, breach of the common law duty of good faith and fair dealing, and violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code. See, *United Services Automobile Ass'n v. Pennington*, 810 S.W.2d 777, 783-784 (Tex. App.— San Antonio 1991, writ denied); *Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990); *Arnold v. National County Mut. Fire & Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987); Tex. Ins. Codes art. 21.21 and 21.55; and Tex. Bus. & Com. Code 17.50 (DTPA).

Because an adjuster's interaction with an insured is almost always based on the insured's relationship with the insurer, the maximum potential liability of an employee, and the range of causes of action potentially available to the insured, should be no

greater than those available against the company (contract, breach of the duty of good faith and fair dealing, Insurance Code, etc.). Likewise, because the adjuster does not have a direct contractual relationship with the insured, and in most cases is only carrying out the company's business, the company has liability to an insured where the adjuster does not. For example, an agent or adjuster cannot be liable for breach of the contract because he or she is not a party to the insurance policy; it is a contract between the insured and the insurer. *Natividad*, 875 S.W.2d at 697. Similarly, an insurance agent or adjuster does not personally owe the common law duty of good faith and fair dealing, and thus cannot be liable for "bad faith". *Id.* However, agents do have a direct relationship with insureds and may have liability to them separate and apart from the carriers.

Since the parameters of claims against agents are well established, we begin with them.

III. LIABILITY OF AGENTS

It was not news to hear in *Garrison* that an insured may have a direct cause of action against an insurance agent, under Art. 21.21 or otherwise. Texas Courts have long held that agents have a direct relationship with insureds and can be sued for negligence. *May v. United Services Assoc. of America*, 844 S.W. 2d 666,669 (Tex. 1992), and for misrepresentations, *State Farm Fire & Cas. Co. v. Gros*, 818 S.W. 2d 908, 913 (Tex. App. — Austin 1991, no writ). Likewise, agents have been subject to claims under the DTPA since *Light v. Wilson*, 662 S.W. 2d 813, 815 (Tex. 1983) (Spears, J. concurring). The significance of *Garrison* to agents is that employee agents are in the same legal position as independent agents. See discussion, *infra* at J-6.

IV. SCOPE OF AGENTS' LIABILITY

Garrison does not create open season on agents. The law has clearly established and well

maintained boundaries on agent exposure, with the agent liable for negligence, breach of contract and specific misrepresentations. However, there are limits.

A. GENERAL ISSUES

First, generally speaking, an agent has no liability for claim decisions on claims handling where the agent is not directly involved. *Griggs v. State Farm Lloyds*, 181 F.3d 694 (5th Cir. 1999). In *Griggs*, the agent had allegedly told the insured "everything will be okay" and that the insured had fully complied with the policy (when he had not). The agent also allegedly told *Griggs* she would see to it the claims were handled to his satisfaction. *Id.* *Griggs* contains an excellent explanation as to why agents should not be liable on claims, and why reliance on alleged misrepresentations by the agent could be unreasonable as a matter of law.

Second, an agent does not owe the insured a duty of good faith and fair dealing. *Natividad*, 875 S.W.2d at 697.

Third, there is no general duty for an agent to obtain sufficient coverage or to give advice to the insured as to the coverages needed; nor is the existence of a duty in these circumstances a question of fact. Texas courts recognize the question of an agent's duty is clearly a question of law. *Sledge v. Mullin*, 927 S.W.2d 89, 92 (Tex. App.—Fort Worth 1996, no writ). An agent owes only two common-law duties to a client: (1) to use reasonable diligence in attempting to place the requested insurance; and (2) to inform the client promptly if unable to do so. *Moore v. Whitney-Vaky Ins. Agency*, 966 S.W.2d 690, 692 (Tex. App.—San Antonio 1998, no writ). Explaining the policy to an insured, or somehow making sure the insured understands all of the coverage, is not a duty owed by the agent. *Id.* Instead, the insured has the duty to read the policy of insurance and is bound by its terms. *Burton v. State Farm Mut. Auto. Ins. Co.*, 869 F. Supp. 480, 486 (S.D. Tex 1994); *Heritage Manor of Blaylock Properties, Inc. v. Peterson*, 677 S.W.2d 689, 691 (Tex. App.—Dallas 1984, writ ref'd n.r.e.)

B. DTPA and Article 21.21

The analysis of an agent's duty does not change

when DTPA or Insurance Code claims are added. "[A]bsent some specific misrepresentation of its terms of coverage by the insurer, the insured's mistaken belief that he is obtaining coverage under certain contingencies which are not in fact covered under an insurance policy is not generally grounds for a DTPA claim." *State Farm Mut. Auto. Ins. Co. v. Moran*, 809 S.W.2d 613, 620-21 (Tex. App.—Corpus Christi 1991, writ denied) (citing *Parkins v. Texas Farmers Ins. Co.*, 645 S.W.2d 775 (Tex. 1983); *Employers Cas. Co. v. Fambro*, 694 S.W.2d 449 (Tex. App.—Eastland 1985, writ ref'd n.r.e.); *Bitter v. Associated Indem. Corp.*, 612 S.W.2d 715 (Tex. Civ. App.—Corpus Christi 1981, no writ). General claims regarding the adequacy or sufficiency of coverage are not actionable under the DTPA. *Moran*, 809 S.W.2d at 621 citing *Fambro*, 694 S.W.2d at 452. Under the Insurance Code, as with the DTPA, a claim based solely on a policyholder's mistaken belief about the scope or availability of coverage is not actionable. *Moore*, 966 S.W.2d at 692-93; *Sledge*, 927 S.W.2d at 94; see also *North Am. Shipbuilding v. Southern Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 835-36 (Tex. App.—Houston [1st Dist.] 1996, no writ). Instead, to be actionable, the policyholder must show a specific misrepresentation about the coverage. *North Am. Shipbuilding v. Southern Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 835-36 (Tex. App.—Houston [1st Dist.] 1996, no writ) (No violation of the insurance code without a specific misrepresentation concerning the scope of coverage). Moreover, a mere failure to increase coverage as requested, while negligence and/or breach of contract, does not rise to the level of a violation of the DTPA. *Frazer v. Texas Farm Bureau Mut. Ins. Co.*, 1999 WL 681985 (Tex. App.—Hou [1st Dist.] (n.w.h), not published.)

Note these pre-*Garrison* cases assume agents are subject to suit under Article 21.21.

V. WHOSE AGENT IS HE?

The Texas Insurance Code generally defines who is an agent. In Article 21.02, an insurer's agent is defined as any person who; (1) solicits insurance on behalf of an insurance company; (2) transmits an application or policy to or from an insurance company; (3) receives or delivers a policy on behalf of an insurance company; (4) examines or

inspects any risk; (5) receives, collects, or transmits an insurance premium; or (6) adjusts a loss on behalf of an insurance company. Thus, when delivering a policy or collecting and remitting premiums, the agent is acting on behalf of the insurer. *Foundation Reserve Ins. Co. v. Wesson*, 447 S.W.2d 436 (Tex. Civ. App.—Dallas 1969, writ ref'd). However, when taking and forwarding an application, the agent is acting on behalf of the insured. *Maintain, Inc. v. Maxson-Mahoney-Turner, Inc.*, 698 S.W. 2d 469, 472 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

In the context of life, health, and accident insurance, the Insurance Code makes no distinction between recording agents and soliciting agents. Rather, agents are more generally defined under the provisions of Section 21.02. See *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 98 (Tex. 1994).

The agent can sometimes act as an agent for both the insured and the insurer. *Merbitz v. Great Nat'l. Life Ins. Co.*, 599 S.W.2d 655, 658 (Tex. Civ. App. — Texarkana 1980, writ ref'd n.r.e.). This dual role requires the agent to collect the premium from the insured, deliver the policy for the carrier, and procure insurance for the insured from the carrier. *Merbitz*, 599 S.W.2d at 658.

Additionally, an insurance agent writing a policy through the Texas Automobile Insurance Plan is not the agent for the ultimate insurer to whom the insured is assigned, at least for purposes of taking the application. *Employers Casualty Co. v. Mireles*, 520 S.W.2d 516, 521 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.). *McKillip v. Employers Fire Ins. Co.*, 932 S.W. 2d 268 (Tex. App. —Texarkana 1996, no writ).

Ultimately, even with the presumption of agency under 21.14, the question of agency remains one of fact and the circumstantial evidence available will likely establish the agency and extent of authority.

**A. Agency Designation Under Article 21.14 and Limitations on Authority:
Local Recording Agent vs. Solicitor**

A more interesting question is who is liable for the acts of an agent. This could be significant where the agent's errors and omissions coverage is insufficient. To some extent, this is controlled by

the "level" of agency, and by the distinction between recording and soliciting agents.

Article 21.14 details the licensing requirements for two categories of agents and details the specific actions that can be performed by each. The Article identifies and divides insurance agents into two broad categories, "local recording agents" and "solicitors." (Article 21.14, Section 1). A local recording agent is defined generally as a person or firm engaged in soliciting insurance, being authorized by an insurance company to solicit, write, sign, execute and deliver policies and to bind companies on risks. (Article 21.14, Section 2(a) 1). A local recording agent must maintain an office and records of the business written, and generally performs the customary duties of a local recording agent. (Article 21.14, Section 2(a) 1).

A "solicitor" is a bona fide solicitor, soliciting and binding insurance risks specifically on behalf of a local recording agent. Article 21.14, Section 2(a)(2). A solicitor may not have an independent office, rather she must share an office with a local recording agent on whose behalf the solicitor works. Article 21.14, Section 2(a) (2). A solicitor may not sign, execute or maintain records of the business and may bind coverage only with the express prior approval of the local recording agent for whom the solicitor works. Article 21.14 Section 2, (a)(2).

B. Limits on Applicability of 21.14

The regulations contained in Article 21.14 are not universal and absolute and there are important exceptions to the Article.

Section 20 of the Article specifically states that:

"No provisions of this Article shall apply to the Life, Health and Accident Insurance business, or the Life, Health and Accident Department of the companies engaged therein, nor shall it apply to any of the following, namely:

(a) Any actual full time home office salaried employee of any insurance carrier licensed to do business in Texas.

(c) Any adjustor of losses, and/or inspector of risks, for an insurance carrier licensed to do

business in Texas.

(d) Any General Agent or State Agent or Branch Manager representing an admitted carrier and licensed insurance company or carrier, or insurance companies or carriers, in a supervisory capacity.

.....
(f) All incorporated or unincorporated mutual insurance companies, their agents and representatives, organized and/or operating under and by authority of Chapters 16 and 17 of this Code.

(g) Nothing in this entire Article shall ever be construed to apply to any member, agent, employee, or representative of any county or farm mutual insurance company as exempted under Chapters 16 and 17 of this Code.

C. Notice Requirements for Appointment of Agents

Section 12 of Article 21.14 requires that, in order for a local recording agent to act on behalf of an insurer, the company or its general or state or special agent making the appointment shall "immediately notify" the Commissioner of Insurance of the appointment. A local recording agent is prohibited from acting in any respect on behalf of an insurer at any time in which an appointment is not on file with the Commissioner. Further, Section 12(a) specifies that: "Such person or firm shall be presumed to be the agent for such company in this state until such company or its general or state or special agent shall have delivered notice to the Commissioner of Insurance that such appointment has been withdrawn."

Similarly, Section 14(a) obligates a local recording agent to notify the State Board of Insurance of the appointment of a solicitor to act on his behalf. A solicitor may not solicit without an appointment on file, and may only have outstanding at any time a notification of appointment from no more than one local recording agent.

Perhaps the more interesting or disputed area of contention involves imposing vicarious liability through the agency relationship on the insurer for the actions of a local recording agent or solicitor purportedly acting on behalf of an insurer. The

requirements of Article 21.14, specifically, the filing of written notice of authorization for local recording agents, and the resulting presumption of agency under Section 12(a), certainly sets up a potential legal basis for vicarious liability of the insurer.

Similarly, the filing of written notice with the Board of Insurance of the appointment of a solicitor by a local recording agent, while not involving a statutory presumption, creates strong evidence in favor of a finding of authority. So, where a lawfully appointment authorized solicitor acts on behalf of a lawfully authorized and appointed local recording agent, vicarious liability may ultimately attach to the insurer. This is why it is important for both insurers and insureds to be aware of the status of the appointments and how the requirements of Article 21.14 can be used to establish or negate authority and agency.

D. Non-Compliance with Article 21.14

Section 4 of Article 21.14 prohibits any person or entity from acting as a local recording agent or solicitor without complying with the license requirements provided for in Section 3 of the Article. It is also illegal for an insurer to pay or otherwise compensate a non-licensed local recording agent, or for a local recording agent to pay or otherwise compensate a non-licensed solicitor. The lack of a license does not negate the effects of actual or implied authority under traditional common-law approach to agency. In fact, depending on the scenario, where an insurer routinely uses a non-licensed local recording agent, it may form the basis for a negligent entrustment or a per se violation claim or cause of action. It is a misdemeanor offense to violate Article 21.14. (Section 24). The Article does not specifically provide for an independent civil cause of action. In fact, the enforcement of the requirements of Article 21.14 are specifically left to the Attorney General, or any district or county attorney or the Board of Insurance Commissioners. (Article 21.14, Section 25).

So what happens if a non-licensed or non-registered recording agent or solicitor purports to issue a policy of insurance on behalf of an insurer, which is later denied or rejected on the basis of the lack of authority? It would seem that even if a

solicitor or local recording agent is non-licensed, as long as such agent is registered, the presumption of actual authority arises and the insurer would be vicariously liable and the coverage is bound. If, conversely, the agent is not registered under the Article, the parties must use a traditional common-law analysis in view of the past dealings, acts of ratification and/or facts that would indicate that the agent was acting as an agent in fact with actual or implied authority. In that situation, the lack of registration would be an important factor that the insurer could argue in denying the authority of the agent.

E. Misrepresentations of Coverage

The purpose of Article 21.14 is to "vest the local recording agent with authority co-extensive with that of the company insofar as writing insurance is concerned and to remove all questions of the local recording agent's actual or apparent authority from the field of *cavil* or dispute." *Shaller v. Commercial Standard Ins. Co.*, 309 S.W.2d 59 (Tex. 1958). Therefore, when a local recording agent makes a misrepresentation of coverage, the misrepresentation is considered that of the insurance company, and will bind the insurance company, and the misrepresentation is considered that of the insurer. *Lexington Ins. Co. v. Buckingham Gate, Ltd., Inc.*, 993 S.W.2d 185 (Tex. App. – Corpus Christi 1999, no writ); *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 694 (Tex. 1979). The end result is that, in effect, a recording agent may be unable to misrepresent coverage since the representations themselves are binding and actually serve to create coverage.

A designated soliciting agent is the agent in fact of the local recording agent, who is the agent in fact of the carrier. While a soliciting agent *may* bind coverage (Section 2(a)(2)), the solicitor must have express prior approval of the local recording agent, and cannot make a contract on behalf of the insurer or otherwise waive policy provisions. Therefore, misrepresentations of coverage by a soliciting agent do not bind an insurer. *Lexington* at 198. Of course, the solicitor may be personally liable if his misrepresentation otherwise constitutes a violation of Article 21.21 or the DTPA. If the local recording agent authorized the solicitor to act on his behalf, the local recording agent may be

vicariously liable.

F. Summary of 21.14

Article 21.14 of the Texas Insurance Code requires insurers to specify and expressly designate authorized agents who may act on their behalf in dealing with prospective insureds concerning the sale of insurance. Such express authorization provides an assumption of authority to act and makes it difficult for an insurer to selectively deny the authority of an agent to act after-the-fact as a way to escape liability. Similarly, the misrepresentations or other unauthorized acts of a loose cannon, not specifically authorized to act on behalf of an insurer, will not bind an insurer. While the traditional notions of actual, apparent and implied agency still apply, the requirements of Article 21.14 may be used as a yardstick to determine whether a carrier may be held liable for the actions or misrepresentations by an agent or solicitor.

VI. INDIVIDUAL ADJUSTER LIABILITY

We now turn to the adjuster. At the outset, we assume that if an adjuster commits an act unrelated to claim handling, such as a bodily assault on a policy holder or negligence resulting in a car accident (either of which violates a duty independently owed to the insured), there is personal liability. This paper will only discuss the adjuster's role in claim handling for an insurer. We begin with the tort of "bad faith".

The Texas Supreme Court has recognized that an insurer owes its insureds a duty of good faith and fair dealing. The breach of this duty is often referred to as "bad faith." To be liable to an insured for "bad faith", an insurer must have failed "to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear..." *The Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 55 (Tex. 1997). Thus, the "bad faith" inquiry begins by determining whether the insurance company's liability for the claim has become reasonably clear (is the claim covered, and, if so, to what extent)? *Tucker v. State Farm Lloyds*, 981 F.Supp. 461 (S.D. Tex. 1997). Then, if the insurer's liability on the claim is reasonably clear, the insurer must be 1) prompt, 2) fair, and 3)

equitable in attempting to settle the claim. *Giles* 950 S.W. 2d 48, 55. If the insurer delays in making a claim decision, fails to conduct a reasonable investigation, or does not offer a reasonable amount to compensate the insured for the loss under the policy, the insurer can be held liable for bad faith. *Id.*

The insurer usually carries out its claim handling functions through adjusters. In fact, corporations, by their very nature, cannot function without human agents. The actions of a corporation agent on behalf of the corporation are deemed the corporation's acts. *Holloway v. Skinner*, 898 S.W. 2d 793, 795 (Tex. 1995). The Supreme Court has said that an individual adjuster does not personally owe an insured a duty of good faith and fair dealing. *Natividad*, 875 S.W.2d at 698. This is because the insurance company employee is not in a direct contractual relationship with the insured. *Id.* The breach of the duty of good faith and fair dealing stems from the special relationship between the insured and the insurer, not the employee. *Id.* The Supreme Court has articulated a need to protect the insured because the insurer controls all aspects of the claim investigation and processing. For that reason, the Court has imposed a tort duty on the insurer in addition to those duties set out in the contract. This duty owed by an insurance company to its insureds is "non-delegable." In other words, an insurance company cannot hide behind the actions of one of its agents or adjusters to shield itself from liability for breach of the duty of good faith and fair dealing nor can it transfer to someone else the duty. *Id.* Likewise, because the individual agent or adjuster does not have a contractual relationship with the insured, no "special relationship" exists. *Id.* Therefore, those classes of people: agents, adjusters, and insurance company employees, cannot be liable to the insured for breach of the duty of good faith and fair dealing. *Id.* If an agent or adjuster commits an act which would breach the duty of good faith and fair dealing, it is the insurance company, not the adjuster, who is liable to the insured. *Id.* Incidentally, this is consistent with the "corporate shield" whereby the corporation, not the individuals, are liable for the wrongs of the corporation. *Holloway*, 898 S.W. 2d at 795.

Thus, there is no common law bad faith claim against an adjuster.

VII. THE TEXAS INSURANCE CODE AND ADJUSTER LIABILITY AFTER GARRISON CONTRACTORS

The confusion about adjuster liability stems from language in Texas Insurance Code art. 21.21, which provides:

"No person shall engage in this state in any trade practice which is defined in this Act as, or determined pursuant to this Act to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."

Tex. Ins. Code. art. 21.21. § 3; emphasis added.

In the Insurance Code, "person" is defined as:

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.

Tex. Ins. Code. art. 21.21. § 2(a); emphasis added.

Until recently, however, it was presumed that even if adjusters could violate the Insurance Code, it would be the insurance company for which they worked that would be liable for any violation. *See, Natividad.* However, based on the language of art. 21.21., the Supreme Court has indicated that adjusters are a "person" within the intent of that act, and thus subject to suit under §16 if they commit a violation of the act. This raises the question of personal exposure for claim handling.

VIII. GARRISON CONTRACTORS

Garrison Contractors concerned the liability of Robert Garrett, a Liberty Mutual employee-agent, who sold insurance for Liberty Mutual. Garrison Contractors had contacted Garrett in 1986 to obtain quotes on Worker's Compensation, General Liability and Automotive Liability Insurance through Liberty. Based on information obtained from Garrett, Garrison purchased a three year multi-line insurance policy from Liberty, which featured a retrospective premium plan. Under a

retrospective premium policy, a base premium is paid, and then supplemental adjustments are made based on actual loss experience. If losses are less than expected, then Garrison would be entitled to a refund, a proportion of the base premium. If losses were greater than expected, then Garrison would owe additional premium.

During the life of the policy, Garrison paid both base premiums and retrospective premiums. At the end of the policy period, Liberty Mutual billed Garrison \$159,371.85 in additional retrospective premiums. Garrison refused to pay, and Liberty Mutual filed suit to collect the premiums. Garrison then filed a counterclaim against Liberty Mutual and a third-party claim against Garrett. The third-party claim alleged that Liberty and Garrett misrepresented the retrospective premium terms, and alleged common law bad faith, breach of fiduciary duty, DTPA, and Insurance Code violations.

The trial court granted summary judgment to Liberty and Garrett on Garrison's counterclaims and third-party action. The court also granted the summary judgment on Liberty Mutual's sworn account suit against Garrison. The Court of Appeals affirmed the summary judgment on the tort claims of breach of the duty of good faith and fair dealing, and breach of fiduciary duty. However, the Court of Appeals reversed the summary judgment on the DTPA and Insurance Code claims. It held that material fact issues remained as to alleged policy misrepresentations, and further that Garrison stated a cause of action against Garrett individually under both the DTPA and the Insurance Code. The Court of Appeals further reversed the summary judgment on the sworn account claim based on fact issues on whether there was an agreement between the parties regarding the amount of premiums.

The primary issue facing the Supreme Court was whether an insurance company employee agent (as opposed to an independent business entity agent), is a "person" under §2 (a) of Article 21.21 of the Insurance Code. As argued by Garrett, he conceded that an agent would be subject to Art. 21.21 liability if he were not a direct employee of an insurance company. The focus of his argument is that since he was a direct employee, he was not covered by Art. 21.21.

The Supreme Court noted that the purpose of Art. 21.21 is "to regulate trade practices in the business of insurance by defining, or providing for the determination of, all such practices in the State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (*Garrison*, 966 S.W. 2d 482, 484). "§3 of Art. 21.21 prohibits any person from engaging in deceptive trade practices in the insurance business, and §16 provides a private cause of action against the person that engages in an act or practice declared in §16 of the article to be unfair or deceptive." *Id.* The court then stated: "Person", means any individual, corporation, association, partnership, reciprocal exchange, inter-insured, Lloyds' insured, fraternal benefits society and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters and life insurance counselors. (Tex. Ins. Code. Art. 21.21, §2(a)).

"Liberty and Garrett contend that the definition only reaches business entities, and not the entities' employees; employees, they contend, do not engage in the business of insurance, but engage in their employer's business." *Garrison*, 966 S.W. 2d 482, 484.

"Liberty and Garret maintain that some individuals, such as independent agents and brokers, are "persons" under Art. 21.21., which individuals who are employed by insurance companies are not."

The court noted that accepting that view would create anomalous results, in that an independent agent would be subject to suit for misrepresenting the policy terms, while an employee/agent would not. The Supreme Court held that result to be contrary to the legislative intent to comprehensively regulate and prohibit deceptive practices. The court thus held that "person" under Art. 21.21. includes individuals who are employed by insurance companies. The court went on to state:

"We emphasize, however, that not every employee of an insurance company is a "person" under Art. 21.21 and therefore subject to suit under §16. To come within the statute, an employee must engage in the business of insurance. In this case, Garrett personally carried out the transaction to form the

core of *Garrison's* complaint. clearly, Garrett was engaged in the business of insurance. On the other hand, an employee who has no responsibility for the sale or services of insurance policies and no special insurance expertise, such as a clerical worker or janitor, does not engage in insurance business... we hold that §16 of Art. 21.21 provides a cause of action against insurance company employees whose job duties call for them to engage in the business of insurance". *Garrison*, 966 S.W. 2d 482, 486, 487."

To some extent, *Garrison Contractors* merely states the obvious, which is that Art. 21.21., uses the word "person" to apply to all persons performing functions subject to regulation under Art. 21.21. However, the language quoted above has been interpreted by some as creating open season on adjusters for making claim decision disliked by the insured.

IX. THE ROUTINE CLAIM DENIAL

From a practical standpoint, if an adjuster or other employee committed a violation of the Insurance Code, he would most certainly have committed the act or omission during his employment for the company. Under the theories of "agency" or "vicarious liability," it is hard to imagine any instances in which an adjuster's action that violates the Insurance Code would not also create the same liability on the part of the insurance company.

X. ARGUMENTS THAT THERE IS STILL NO INDIVIDUAL LIABILITY FOR CLAIM HANDLING UNDER TEXAS LAW

As the law stands now, there is no authority in Texas for holding a claim adjuster liable to an insured for routine claim handling. *Garrison Contractors*, states that adjusters, agents, and other insurance company employees engaged in the business of insurance are "subject to suit" under the Insurance Code. However, to be personally liable to an insured, the adjuster must have committed a violation of the act. We anticipate, and have already seen, much litigation regarding the extent to which an adjuster or other employee can be held liable to an insured for claim processing. There are several reasons adjusters and other insurance company employees should not

be liable to insureds for claim handling, and why the routine claim denial should not constitute an adjuster's violation of 21.21.

Appendix "A" sets forth a number of specific acts that violate Art. 21.21. The vast majority do not concern adjusters. The section on unfair settlement practices includes the following as an unfair practice: - **Failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear;** Art. 21.21. § 410(10)(a)(ii). This is the very same language now adopted in *Giles* as the common law duty of good faith and fair dealing of an insurer. *Giles*, 950 S.W. 2d at 55. When a carrier has duty to pay (by contract), and that liability has become reasonably clear, failing to attempt in good faith to settle the claim subjects the carrier to "bad faith" exposure. *Giles*, 950 S.W. 2d at 55.

In fact, it is now well established that liability for claim handling under both the Deceptive Trade Practices Act and the Insurance Code is dependent on an insured having a valid common law bad faith cause of action against the defendant. *Beaumont Ricemills, Inc. v. Mid-American Indemn. Ins. Co.*, 848 F.2d 950, 952 (5th Cir. 1991); *Saunders v. Commonwealth Lloyds Ins. Co.*, 928 S.W.2d 322, 324 (Tex. App.—Austin 1996, no writ); *Emmert v. Progressive County Mut. Ins. Co.*, 882 S.W.2d 32, 36 (Tex. App.—Tyler 1994, no writ); *Love of God Holiness Temple Church v. Union Standard Ins. Co.*, 860 S.W.2d 179, 192 (Tex. App.—Texarkana 1993, writ denied); *Charter Roofing v. Tri-State Ins. Co.*, 841 S.W.2d 903, 906-907 (Tex. App.—Houston [14th Dist.] 1992, writ denied). Since insureds do not have valid common law bad faith causes of action against adjusters for claim handling, it is questionable whether they can have a valid DTPA or Insurance Code cause of action against them either, based on mere claims handling.

Further, adjusters and other insurance company employees are not parties to the insurance contract with the insureds. *Natividad*, 875 S.W.2d at 697. Employees have no personal duty to pay a claim; they merely act on behalf of insurance companies to determine how much the company should pay. In many cases, the adjuster does not have independent decision-making authority on claims: any such authority comes from the company for whom the

adjuster works and is based on that company's policies, procedures and guidelines. The adjuster is not deciding whether he will personally pay the claim, he is deciding whether his employer will pay the claim. If a claim is denied, it is only the employer who failed to pay -- not the employee. After all, the "failure to pay" assumes a duty to pay. *Republic Insurance Co. v. Stoker*, 903 S.W. 2d 338 (Tex. 1995), (no bad faith liability without contract liability); *Tucker*, 981 F. Supp. 461 (once liability is clear, then was insurer reasonable). Thus, it is the company, not the adjuster, that denies the claim, and the company not the adjuster, who potentially violates Art. 21.21. If the adjuster does not personally deny the claim (but instead merely communicates the company's claim decision), then the adjuster cannot have personally violated Article 21.21. A strong argument can be made that the adjuster is a person under 21.21., but does not violate the Act merely by communicating the company's claim decision. Unless the adjuster personally owes the claim or personally commits some enumerated violation of Art. 21.21., there should be no personal liability to the insured.

We believe it is significant that there are no reported opinions which affirm liability against an adjuster or other employee for claim handling functions. All reported cases to date have dealt with either independent or captive agents who have made representations to insureds regarding either policy benefits or premiums. For this reason, we believe *Garrison* does not overrule *Natividad* and there is still no personal liability against adjusters in Texas for routine claim handling activities.

XI. TEXAS DECEPTIVE TRADE PRACTICES ACT: POTENTIAL INDIVIDUAL LIABILITY

The dispute in *Garrison* did not involve claims under the Deceptive Trade Practices Act. However, the Texas Deceptive Trade Practices Act contains the same language as the Insurance Code regarding the entities who may violate the Act. Specifically, under the Deceptive Trade Practices Act, a "consumer" (an individual, partnership or corporation who seeks or acquires by purchase or lease, any goods or services) may maintain an action under the Deceptive Trade Practices Act against any "person" who uses a false, misleading or deceptive act or practice set out in the statute

and which was relied on by the consumer to the consumer's detriment. As in the Insurance Code, "person" means an individual, partnership, corporation, association or other group... Tex. Bus. Com. Code § 17.45(3).

There are twenty-five enumerated acts which are considered violations of the Deceptive Trade Practices Act. Many do not involve insurance, but many others involve misrepresentation of goods or services sold (including insurance policies) at the point of sale. However, DTPA § 17.50 specifically provides that a violation of Article 21.21 of the Insurance Code "by any person" is also a violation of the DTPA.

Therefore, liability, if any, under the Deceptive Trade Practices Act will probably be co-extensive with Article 21.21.

XII. CONCLUSION

Until the Texas Supreme Court clarifies whether Article 21.21 of the Insurance Code and the Deceptive Trade Practices Act impose personal liability on adjusters for routine claims handling, it is likely adjusters will continue to be named personally in first party lawsuits against insurance companies. The recent case of *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.* 966 S.W.2d 482 (Tex. 1997) has created considerable confusion about adjuster liability in Texas. It has certainly opened the door to litigation about adjuster liability in Texas.

THE PROPER DEFENDANTS:
SUITS UNDER ARTICLE 21:14,
Garrison Contractors AND OTHER AVENUES

APPENDIX "A"

APPENDIX "A"

There are a wide variety of acts which constitute violations of Insurance Code art. 21.21. The following is a paraphrased summary of several acts or omissions which violate Article 21.21:

- Misrepresenting or falsely advertising policies, policy terms, or policy benefits. Tex. Ins. Code. art. 21.21. § 4(1). (In order to be actionable, the misrepresentation of false advertisement must have occurred before a loss and must have been relied by the insured to his or her detriment). *State Farm County Mut. Ins. Co. of Texas v. Moran*, Tex. App--Corpus Christ 1991, error denied).
- False Advertising: making a public statement regarding insurance or any person's business of insurance that is untrue, deceptive or misleading. Tex. Ins. Code. art. 21.21. § 4(2).
- Defamation: publishing or circulating any oral or written statement which is false or maliciously critical of the financial condition of an insurer and which is calculated to injure a person engaged in the insurance business. Tex. Ins. Code. art. 21.21 § 4(3).
- Engaging in actions or entering into an agreement tending to create a monopoly in the business of insurance. Tex. Ins. Code. art. 21.21 § 4(4).
- Filing false financial statements regarding an insurance company with the intent to deceive. Tex. Ins. Code. art. 21.21 § 4(5).
- Offering stock options or other benefits as an inducement to the purchase of insurance. Tex. Ins. Code. art. 21.21 § 4(6).
- Unfairly discriminating between individuals of the same class and equal expectations of life and the rates charged for life insurance contracts. Tex. Ins. Code. art. 21.21 § 4(7).
- Except as permitted by law, giving or promising rebates as an inducement to insurance. Tex. Ins. Code. art. 21.21 § 4(8).
- Using a symbol or name that is deceptively close to the name or symbol of another insurance company and any display, publication, pamphlet, etc. Tex. Ins. Code. art. 21.21 § 4(9).

It seems obvious that most adjusters never have the opportunity to commit those violations. Note, however, that agents could easily violate these.

Claims issues are also addressed, with the following acts or omission violating the act:

--Unfair settlement practices:

- Misrepresenting to the claimant any material fact or policy provision relating to a coverage at issue;
- **Failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear;**
- Failing to attempt in good faith to settle under one portion of a policy a claim to which the insurer's liability has become reasonably clear in order to influence the claimant to settle an additional claim under another portion of the coverage (unless payment under one portion of the coverage constitutes evidence of liability under another portion of policy);
- Failing to promptly provide a policyholder a reasonable explanation for the insurer's denial of a claim or for an offer of a compromise settlement;
- Failing to timely affirm or deny coverage, or submit a reservation of rights
- Refusing or unreasonably delaying settlement under an applicable first party coverage on the basis that other coverage may be available or third parties may be responsible (except as may be specifically provided in the policy)
- Attempting to enforce a full and final release of a claim when only a partial payment has been made (except in the case of a compromise settlement of a doubtful or disputed claim);
- Refusing to pay a claim without first having conducted a reasonable investigation;

- Regarding an auto policy, delaying or refusing settlement of a claim solely because there is other insurance of a different type available to satisfy all or any part of the loss forming the basis of the claim;
- Requiring production of federal income tax returns as a condition of settling a claim unless a court orders the tax returns produced, the claim involved a fire loss, or the claim involves lost income or profits.
- Misrepresenting an insurance policy by making an untrue statement of material fact, failing to state a necessary material fact so that a communication is misleading, making a misstatement of law, failing to disclose matters to an insured, or making any statement in such a manner as to mislead a reasonably prudent person to a false conclusion of a material fact.

The above acts or omissions are now, after *Garrison*, potentially identifiable as acts or omissions for which an adjuster or other employee can be personally liable. Interestingly, the statutory list includes breach of the duty of good faith and fair dealing (defined as failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear), for which the Texas Supreme Court has already held an adjuster does not have personal liability. When the Supreme Court issued *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, it did not overrule its previous opinion in *Natividad* (that an insurance company employee cannot be personally liable to an insured for breach of the duty of good faith and fair dealing). Therefore, to assert liability under the Insurance Code, one must argue there is no personal adjuster liability for breach of the duty of good faith and fair dealing, but there is personal adjuster liability for the same act under the Insurance Code.

THE PROPER DEFENDANTS:
SUITS UNDER ARTICLE 21:14,
Garrison Contractors and Other Avenues

APPENDIX "B"

**LIBERTY MUTUAL INSURANCE COMPANY
and Robert G. Garrett, Petitioners,
v.
GARRISON CONTRACTORS, INC.,
Respondent**

No. 96-1013.

Supreme Court of Texas.

Argued Oct. 7, 1997.

Decided April 14, 1998.

Insurer brought suit to collect retrospective premiums due under multilines insurance policy. Insured counterclaimed and asserted third-party claims against insurance agent. The 244th District Court, Ector County, Joe Connally, J., entered summary judgments for insurer and agent, and insured appealed. The Court of Appeals, Larsen, J., 927 S.W.2d 296, affirmed in part and reversed in part. On application for writ of error, the Supreme Court, Spector, J., held that: (1) term "person," as used in statute prohibiting any person from engaging in any deceptive trade practices in the insurance business, was not limited only to business entities such as insurance companies, but was broad enough to include their individual employees; and (2) material questions of fact, as to misrepresentations allegedly made by insurance company employee as to alleged cap on insured employer's liability for retrospective premiums on workers' compensation insurance, precluded entry of summary judgment.

Affirmed.

Baker, J., concurred in part and dissented in part and filed opinion, in which Gonzalez, J., joined.

[1] STATUTES ⇨ **181(1)**
361k181(1)

Supreme Court's objective in construing a statute is to determine and give effect to the legislature's intent. V.T.C.A., Government Code § 312.005.

[2] STATUTES ⇨ **188**
361k188

In construing a statute, Supreme Court first looks to the plain and common meaning of statute's words.

[3] STATUTES ⇨ **208**
361k208

In construing a statute, Supreme Court must view statute's terms in context and give them full effect.

[4] STATUTES ⇨ **217.2**
361k217.2

Statute's legislative history may be helpful in divining the legislature's intent.

[5] INSURANCE ⇨ **1560**
217k1560

Term "person," as used in statute prohibiting any person from engaging in any deceptive trade practices in the insurance business, was not limited only to business entities such as insurance companies, or to such entities and their independent agents and brokers, but was broad enough to include individual insurance company employees, despite individual employee's contention that, as insurance company employee, he could not engage in the business of insurance but only in the business of his employer. V.A.T.S. Insurance Code, art. 21.21. See publication Words and Phrases for other judicial constructions and definitions.

[5] INSURANCE ⇨ **3415**
217k3415

Term "person," as used in statute prohibiting any person from engaging in any deceptive trade practices in the insurance business, was not limited only to business entities such as insurance companies, or to such entities and their independent agents and brokers, but was broad enough to include individual insurance company employees, despite individual employee's contention that, as insurance company employee, he could not engage in the business of insurance but only in the business of his employer. V.A.T.S. Insurance Code, art. 21.21. See publication Words and Phrases for other judicial constructions and definitions.

[6] STATUTES ⇨ **212.4**
361k212.4

In construing a statute, Supreme Court does not lightly presume that the legislature may have done a useless act.

[7] INSURANCE ⇨ **1560**
217k1560

While the term "person," as used in statute prohibiting any person from engaging in any deceptive trade practices in the insurance business, was broad enough to include individual insurance company employees, not every employee of insurance company was a "person" under the statute; to come within the statute, insurance company employee could not be a clerical worker or janitor, but had to be engaged in business of insurance. V.A.T.S. Insurance Code, art. 21.21.

See publication Words and Phrases for other judicial constructions and definitions.

[7] INSURANCE ⇨ 3415

217k3415

While the term "person," as used in statute prohibiting any person from engaging in any deceptive trade practices in the insurance business, was broad enough to include individual insurance company employees, not every employee of insurance company was a "person" under the statute; to come within the statute, insurance company employee could not be a clerical worker or janitor, but had to be engaged in business of insurance. V.A.T.S. Insurance Code, art. 21.21.

See publication Words and Phrases for other judicial constructions and definitions.

[8] INSURANCE ⇨ 1560

217k1560

Insurance company employee whose job responsibilities included soliciting and obtaining insurance policy sales and explaining policy terms to prospective buyers was engaged in the "business of insurance," and qualified as a "person" under statute prohibiting any person from engaging in any deceptive trade practices in the insurance business. V.A.T.S. Insurance Code, art. 21.21.

See publication Words and Phrases for other judicial constructions and definitions.

[9] JUDGMENT ⇨ 181(23)

228k181(23)

Material questions of fact, as to misrepresentations allegedly made by insurance company employee as to alleged cap on insured employer's liability for retrospective premiums on workers' compensation insurance, precluded entry of summary judgment for employee and insurance company on employer's claims under the Deceptive Trade Practices Act (DPTA) and statute prohibiting any person from engaging in any deceptive trade practices in the

insurance business. V.A.T.S. Insurance Code, art. 21.21.

*483 P. Michael Jung, W. Neil Rambin, Dallas, for Petitioners.

Wade C. Hudman, Odessa, Philip K. Maxwell, Austin, for Respondent.

SPECTOR, Justice, delivered the opinion of the Court, in which PHILLIPS, Chief Justice, HECHT, ENOCH, OWEN, ABBOTT and HANKINSON, Justices, join.

The primary issue in this case is whether an insurance agent employed by an insurance company is a "person" under section 2(a) of Article 21.21 of the Insurance Code. The court of appeals held that Robert Garrett, a Liberty Mutual Insurance Company employee-agent, was a person under that provision, and accordingly subject to suit under section 16 of Article 21.21. We affirm.

I.

In 1986, the president of Garrison Contractors, Inc. contacted Robert Garrett to obtain an insurance quote on the company's workers' compensation, general liability, and automobile liability insurance from Liberty Mutual Insurance Company. Garrett was a Liberty employee-agent whose duties included soliciting and obtaining insurance policy sales for Liberty as well as explaining policy provisions and premium calculations to customers.

After meeting with Garrett, Garrison purchased a three-year, multi-line insurance policy from Liberty. The policy featured a retrospective premium plan, in which a base premium is paid, then adjusted based on actual losses. If losses are less than expected, the insurer refunds part of the base premium. If losses are greater than expected, the insured owes additional premiums. During the policy period, Garrison paid both base premiums and retrospective premiums. When the policy period ended, Liberty billed Garrison \$159,371.85 more in retrospective premiums. Garrison refused to pay and Liberty sued to collect the premiums. Garrison *484 counterclaimed against Liberty and filed a third-party claim against Garrett. Claiming that Liberty and Garrett misrepresented the retrospective premium terms, Garrison alleged common-law bad faith, breach of fiduciary duty, DTPA violations,

and Insurance Code violations.

The trial court granted Liberty and Garrett's motion for summary judgment on Garrison's counterclaim against Liberty and its third-party claim against Garrett. The trial court also granted Liberty's motion for summary judgment on its sworn account suit against Garrison.

The court of appeals affirmed Liberty's summary judgment, disallowing Garrison's claims for breach of the duty of good faith and fair dealing and breach of fiduciary duty. However, the court of appeals reversed the summary judgment for Liberty and Garrett against Garrison's DTPA and Insurance Code claims. The court of appeals held, in part, that material fact issues remained about the alleged policy misrepresentations, and that Garrison had a cause of action against Garrett individually on both the DTPA and Insurance Code claims. [FN1] Finally, the court of appeals reversed the summary judgment on Liberty's sworn account claim because Garrison's summary judgment proof raised a fact issue on whether there was agreement between the parties regarding price due to the alleged misrepresentations.

FN1. Liberty and Garrett's summary judgment motion did not assert that Garrison's DTPA claims against Garrett individually were precluded. Instead, the summary judgment motion focused on Garrett's individual liability under the Insurance Code. Likewise, on appeal, the defendants do not argue about Garrett's individual liability under the DTPA. Accordingly, we express no opinion on the issue of whether there may be individual DTPA liability against an insurance company employee.

We granted Liberty and Garrett's application for writ of error primarily to consider whether an insurance company employee is a "person" under section 2(a) of Article 21.21 of the Insurance Code.

II.

[1][2][3][4] Our objective when we construe a statute is to determine and give effect to the Legislature's intent. Tex. Gov't Code § 312.005; *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex.1997). We accomplish that purpose, first, by looking to the plain and common meaning of the statute's words. See *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937,

939 (Tex.1993). We must also view a statute's terms in context and give them full effect. See *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex.1994); *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex.1985). A statute's legislative history may also be helpful in divining the Legislature's intent. *Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 422 (Tex.1995). Finally, we bear in mind the "old law, the evil, and the remedy." Tex. Gov't Code 312.005.

[5] The purpose of Article 21.21 "is to regulate trade practices in the business of insurance by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Tex. Ins.Code art. 21.21, § 1(a) (emphasis added). Section 3 of Article 21.21 prohibits any person from engaging in deceptive trade practices in the insurance business, and section 16 provides a private cause of action against a person that engages in an act or practice declared in section 4 of the article to be unfair or deceptive. Id. § 16(a). In addition, the Texas Department of Insurance and the attorney general are authorized to take enforcement actions against any person who engages in deceptive acts or practices. See id. §§ 6, 7, 15.

"Person" means

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. § 2(a) (emphasis added). Liberty and Garrett contend that the definition only *485 reaches business entities, and not the entities' employees; employees, they contend, do not engage in the business of insurance, but engage in their employer's business. They argue that no purpose is served by including employees like Garrett in the definition of "person" because an insurance company will always be liable for its employees' activities in the course and scope of employment. See *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 98 (Tex.1994) (citing *Royal Globe Ins. Co. v. Bar Consultants*, 577 S.W.2d 688, 693-94 (Tex.1979)).

We disagree. First, the legislative history of a

1985 amendment to Article 21.21 supports the conclusion that the term "person" is not limited to business entities. In the 1985 session, the Legislature modified section 16 of Article 21.21. That section had formerly provided a cause of action for unfair or deceptive insurance practices "against the company or companies engaging in such acts or practices." Act of May 9, 1973, 63rd Leg., R.S., ch. 143, § 2(c), 1973 Tex. Gen. Laws 322, 338 (amended 1985) (current version at Tex. Ins.Code art. 21.21, § 16) (emphasis added). The Legislature amended section 16 to provide a cause of action against "a person or persons" engaging in unfair or deceptive practices, rather than "a company or companies." Act of March 19, 1985, 69th Leg., R.S., ch. 22, § 3, 1985 Tex. Gen. Laws 395 (current version at Tex. Ins.Code art. 21.21, § 16).

[6] The word "company" is commonly understood to mean "a business enterprise; firm." AMERICAN HERITAGE DICTIONARY 384 (3d ed.1992). Thus, the Legislature's change of the word "company" to the term "person" is highly suggestive: if the Legislature intended the term "person" to have the narrow meaning that Liberty and Garrett would give it, this alteration would have been an empty gesture. The word "company" would have been broad enough to include the business entities that Liberty and Garrett contend are within the statutory definition. But we do not lightly presume that the Legislature may have done a useless act. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex.1981).

Additionally, we have previously noted that the term "business of insurance" in Article 21.21 is "connected with and used with reference to a particular trade or subject matter." *Great American Ins. Co.*, 908 S.W.2d at 421 (citing Tex. Gov't Code § 312.002(b)). Therefore, the Legislature has instructed us to assign the term "the meaning given by experts in the particular trade, subject matter, or art." Tex. Gov't Code § 312.002(b). In this case, the Department of Insurance has appeared as an *amicus curiae*. The Department's expertise in the insurance trade is unquestionable: it was "created to regulate the business of insurance in this state." Tex. Ins.Code art. 1.01A(b). The Department maintains that an insurance company employee may engage in the business of insurance, and therefore, may be a "person" under Article 21.21.

The Department's regulations reflect that position. The Department "is authorized to promulgate ... and enforce reasonable rules and regulations ... necessary in the accomplishment of the purposes" of Article 21.21. Tex. Ins.Code art. 21.21, § 13(a). Exercising that power, the Department has adopted section 21.1 of Title 28 of the Texas Administrative Code. That rule provides:

It is the purpose of these sections to further define and state the standards that are necessary to prohibit deceptive acts or deceptive practices by insurers and insurance agents and other persons in their conduct of the business of insurance...irrespective of whether the person is acting as insurer, principal, agent, employer, or employee, or in other capacity or connection with such insurer.

28 Tex. Admin. Code § 21.1 (West 1997) (emphasis added).

Liberty and Garrett maintain that some individuals, such as independent agents and brokers, are "persons" under Article 21.21, while individuals who are employed by insurance companies are not. If we were to accept that view, however, it would create anomalous results. An independent agent would be subject to suit under section 16 of Article 21.21 (and to enforcement action under sections 7 and 15) for misrepresenting a policy's terms, while an employee-agent would not. *486 That result is contrary to the Legislature's intent to comprehensively regulate and prohibit deceptive insurance practices. See Tex. Ins.Code art. 21.21, § 1(a).

Liberty and Garrett also assert that our reasoning in *Allstate Insurance Co. v. Watson* precludes a holding that insurance company employees are "persons" under Article 21.21. 876 S.W.2d 145 (Tex.1994). In *Watson*, we held that a third-party claimant lacked standing to sue her adversary's carrier under Article 21.21. *Id.* at 150. *Watson*, however, is simply inapposite because this case does not involve a third-party claim.

Liberty and Garrett next argue that section 23 of article 21.21 decides the issue here. Section 23 provides that "[t]hose civil penalties, premium refunds, judgments, compensatory judgments, individual recoveries, orders, class action awards, costs, damages, or attorneys' fees which are assessed or awarded as provided in this Article shall

be paid only from the capital or surplus funds of the offending insurance company." Tex. Ins.Code art. 21.21, § 23. Liberty and Garrett contend that because section 23 only refers to payment of judgments by an "offending insurance company," the Legislature has limited article 21.21's remedies to recovery against insurance companies. See *id.* § 23. We disagree. While section 23 restricts how an "offending insurance company" may satisfy a judgment under article 21.21, it does not limit the scope of section 2(a).

Finally, a number of other statutes define "person" similarly to Article 21.21. Like Article 21.21, these statutes first list an individual among the regulated class, followed by various types of legal entities, followed by the general catch phrase "any other legal entity." See, e.g., Tex.Rev.Civ. Stat arts. 4447cc, § 3(a)(6) (Environmental Health and Safety Audit Privilege Act), 4542a-1, § 5(31) (Texas Pharmacy Act), 5221l, § 6(j) (Health Spa Act), 8407a, § 4(j) (Texas Barber Law), and 9023c, § 1(4) (solicitations by public safety organizations, publications, and independent promoters); Tex. Health & Safety Code § 341.001(5) (Minimum Standards of Sanitation and Health Protection Measures); Tex. Health & Safety Code § 361.003(23) (Solid Waste Disposal Act); Tex. Health & Safety Code § 382.003(10) (Clean Air Act); Tex. Health & Safety Code § 481.002(33) (Texas Controlled Substances Act); Tex. Nat. Res.Code § 131.004(16) (Uranium Surface Mining and Reclamation Act); Tex. Water Code § 31.001(6) (subsurface evacuations). If, as the dissent would hold, the definition encompasses only legal entities under Article 21.21, individual employees would also not be regulated (or protected) under other laws that similarly define "person."

[7][8] We emphasize, however, that not every employee of an insurance company is a "person" under Article 21.21 and therefore subject to suit under section 16. To come within the statute, an employee must engage in the business of insurance. In this case, Garrett personally carried out the transaction that forms the core of Garrison's complaint. Garrett testified that his job responsibilities included soliciting and obtaining insurance policy sales and explaining policy terms to prospective buyers. He was also responsible for explaining premium calculations to consumers.

Garrett was thus required to have a measure of expertise in the field, which was necessary to perform his job. Clearly, Garrett was engaged in the business of insurance. On the other hand, an employee who has no responsibility for the sale or servicing of insurance policies and no special insurance expertise, such as a clerical worker or janitor, does not engage in the insurance business.

III.

[9] Liberty and Garrett argue, finally, that the court of appeals erred in remanding Garrison's DTPA and Insurance Code claims and related defenses to Liberty's sworn account claim. We disagree. The court of appeals held that the trial court erred in granting summary judgment because Garrison raised a material fact issue on whether Liberty and Garrett misrepresented the policy terms. 927 S.W.2d at 300. Alternatively, Liberty and Garrett contend that the court of appeals remanded too much because it held that only one of Garrison's grounds for recovery under the DTPA and Insurance Code was viable.

*487 The court of appeals compared some of the allegations in Garrison's summary judgment affidavits to claims that another court of appeals held were not actionable in *Heritage Manor of Blaylock Properties, Inc. v. Petersson*, 677 S.W.2d 689, 691 (Tex.App.--Dallas 1984, writ ref'd n.r.e.). 927 S.W.2d at 300. But the court reversed the summary judgment because Garrison's affidavits created a fact issue on whether Liberty and Garrett violated the DTPA and Insurance Code by misrepresenting that the retrospective premiums would not exceed ten to fifteen percent of Garrison's 1986 premium. *Id.*

Our decision in *Coats* controls our disposition of these points. In *Coats*, we held that an insurance company could be liable under the Insurance Code for its agent's affirmative representations about the policy. 885 S.W.2d at 99. Garrison presented summary judgment evidence creating a fact issue on whether Liberty and Garrett misrepresented the policy terms by telling Garrison that the retrospective premiums were subject to a cap. Because Liberty and Garrett did not establish their entitlement to judgment as a matter of law on Garrison's DTPA and Insurance Code claims and defenses, the court of appeals did not err in

remanding.

* * *

We hold that section 16 of Article 21.21 provides a cause of action against insurance company employees whose job duties call for them to engage in the business of insurance. We also hold that the court of appeals properly remanded Liberty's sworn account claim and Liberty and Garrison's Insurance Code and DTPA claims to the trial court. Accordingly, we affirm the judgment of the court of appeals.

BAKER, Justice, joined by GONZALEZ, Justice, concurring and dissenting in part.

I agree with the Court's judgment except where the Court holds that an insurance company employee, acting within the course and scope of employment, can be individually liable under the Insurance Code. Therefore, I dissent in part.

I. BACKGROUND

After Garrison refused to pay a retrospective premium, Liberty sued to collect the premium. Garrison counterclaimed against Liberty and filed a third-party claim against Liberty's employee, Garrett. The court of appeals reversed a summary judgment for Liberty and Garrett. The court of appeals held, in part, that material fact issues remained about alleged policy misrepresentations, and that Garrison had a private cause of action against Garrett individually under the Insurance Code. We granted application for writ of error to decide whether an insurance company employee can be individually liable under the Insurance Code for acts in the course and scope of employment.

II. INSURANCE CODE CLAIMS AGAINST INSURANCE COMPANY EMPLOYEES

As the Court holds, we determine the Legislature's intent by the plain and common meaning of the statute's words. See *Monsanto Co. v. Cornerstones Mun. Util. Dist.*, 865 S.W.2d 937, 939 (Tex.1993). When a statute is clear and unambiguous, we enforce that clear meaning. See *Monsanto*, 865 S.W.2d at 939. We must also give full effect to all a statute's terms in context. See *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133

(Tex.1994); *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex.1985). Here, the statute does not envision individual liability against insurance company employees. [FN1]

FN1. The Court gives considerable deference to the Department of Insurance's views as *amicus curiae*. Importantly, the Insurance Code's regulatory powers are broad and extend to "all agents of [insurance] companies," regardless of whether they are a "natural or artificial person [] engaged in the business of insurance." See Tex. Ins.Code art. 1.10(7)(g). These broad regulatory powers are unlike article 21.21 which gives parties like Garrison a more limited private right of action. Consequently, the Department's regulatory powers are not affected by our interpretation of article 21.21, section 16(a)'s scope.

Article 21.21 allows a person harmed by unfair competition methods or unfair or deceptive acts or practices to sue "the person or persons engaging in such acts or practices." *488 See Tex. Ins.Code art. 21.21, § 16(a). Article 21.21, section 2(a) lists potential defendants by defining "person" as:

[a]ny 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.

Tex. Ins.Code art. 21.21, § 2(a)(emphasis added).

Thus, for a "person" to have Insurance Code liability, the "person" must be a "legal entity engaged in the business of insurance." See Tex. Ins.Code art. 21.21, § 2(a). Not just any "person" fits the definition. Instead, only a "person" that acts as a "legal entity" in the insurance business can be held liable.

Because article 21.21, section 2(a) limits liability to "legal entit[ies] engaged in the business of insurance," it does not provide a cause of action against insurance company employees. See *French v. State Farm Ins. Co.*, 156 F.R.D. 159, 163 (S.D.Tex.1994); *Ayoub v. Baggett*, 820 F.Supp. 298, 299 (S.D.Tex.1993); *Arzehgar v. Dixon*, 150 F.R.D. 92, 94-95 (S.D.Tex.1993). The Insurance Code's "focus and its reach go to the business entities that provide insurance, not the employees of those providers." *Ayoub*, 820 F.Supp. at 299 (citing Tex. Ins.Code Ann. art. 21.21, § 1(a))(emphasis added). "To hold otherwise would

be to conclude that Texas intended to put every individual employee of an insurance provider at risk of liability for trade practices of the employer." Ayoub, 820 F.Supp. at 299. Nothing in the statute "suggests that private claims against individual employees are part of the Texas scheme." Ayoub, 820 F.Supp. at 299.

Moreover, the term "legal entity" simply does not contemplate insurance company employees the way that it does insurance companies, independent agents, insurance brokers, independent adjusters, or independent life insurance counselors. See Tex. Ins.Code art. 21.07, § 6(a)(providing for licensing of agents in general, who may represent multiple insurers); *Employers Cas. Co. v. Mireles*, 520 S.W.2d 516, 520 (Tex.Civ.App.--San Antonio 1975, writ ref'd. n.r.e.) (noting distinction between independent agents and insurance company employee agents); Tex. Ins.Code art. 21.07-7, § 2(2)(providing for licensing of brokers and defining broker as "a person, other than an officer or employee of an insurer, who solicits, negotiates, or places reinsurance business on behalf of an insurer") (emphasis added); Tex. Ins.Code art. 21.07-4, § 1(a)(providing for licensing and regulation of insurance adjusters who may be an independent contractor or an employee); Tex. Ins.Code art. 21.07-2, § 3 (providing for licensing and regulation of independent life insurance counselors and expressly excluding insurance company employees from statute's scope).

Where the Legislature intended to impose personal liability under the Insurance Code, it has done so expressly. Article 21.02 provides:

Any person who solicits insurance on behalf of any insurance company ... without such company having first complied with the requirements of the laws of this State, shall be personally liable to the holder of any policy of insurance in respect of which such act was done for any loss covered by the same.

Tex. Ins.Code art. 21.02 (emphasis added); see also Tex. Ins.Code art. 21.02-1 (imposing fines against individuals if violations occur while working for an unauthorized company) and art. 21.07-1, § 2(b)(imposing personal liability for insured's losses if policy is from an unauthorized company). Therefore, absent evidence that an insurance company employee acted for a noncomplying

company, there can be no individual liability against an insurance company employee acting in the course and scope of employment. See generally Tex. Ins.Code art. 1.14-1 (concerning general compliance laws for insurers in Texas and Legislature's concern about unauthorized insurance companies); see also Tex. Ins.Code art. 21.21, § 2(a); *Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex.1995) (regarding general rule about an employee's individual liability).

Of course, an insurer may be liable for its employees' misrepresentations. See *Celtic *489 Life Ins. Co. v. Coats*, 885 S.W.2d 96, 98 (Tex.1994); *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 700 (Tex.1994); *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 693 (Tex.1979). A suit against an insurer alleging that the insurer's employee, acting in the scope of employment, committed wrongful acts under the Insurance Code, accomplishes the same goal as suing the employee: The insurer is the party responsible for damages caused by its employees' acts within the scope of their employment. See *Celtic Life*, 885 S.W.2d at 98; *Natividad*, 875 S.W.2d at 700; see also *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 149 (Tex.1994) ("The obligations imposed by art. 21.21 of the Insurance Code and Vail are engrafted onto the contract between the insurer and insured....").

Here, Garrison's insurance contract is with Liberty, not with Liberty's employee, Garrett. It is the contract that vests the insurer with exclusive control over its relationship with the insured. See *Natividad*, 875 S.W.2d at 696. As with its common law duties to the insured, the disputed statutory duties here begin and end with Liberty--"the buck stops with them." *Natividad*, 875 S.W.2d at 698 n. 7. I would reverse the court of appeals and affirm the trial court's summary judgment for Garrett against Garrison's Insurance Code claim.

III. CONCLUSION

I would hold that a statutory cause of action under the Insurance Code does not exist against an insurance company employee for his or her acts in the course and scope of employment. Because the Court holds otherwise, I respectfully dissent.

END OF DOCUMENT

THE PROPER DEFENDANTS:
SUITS UNDER ARTICLE 21:14,
Garrison Contractors and Other Avenues

APPENDIX "C"

Gerry M. GRIGGS, Plaintiff-Appellant,
v.
STATE FARM LLOYDS; Lark P. Blum,
Defendants-Appellees.

No. 98-20217.

United States Court of Appeals,
Fifth Circuit.

July 20, 1999.

Rehearing Denied Aug. 23, 1999.

Insured sued his homeowner's insurer and independent agent in state court, seeking to recover for loss of sports memorabilia in burglaries. Following removal, the United States District Court for the Southern District of Texas, Lynn N. Hughes, J., dismissed agent as fraudulently joined and granted him attorney fees, and granted summary judgment for insurer. Insured appealed. The Court of Appeals, DeMoss, Circuit Judge, held that: (1) agent was fraudulently joined to defeat diversity jurisdiction; (2) award of attorney fees was not an abuse of discretion; (3) insured failed to properly document his losses; and (4) insurer did not act in bad faith.

Affirmed.

[1] REMOVAL OF CASES ⚡ **107(9)**

334k107(9)

District court's orders dismissing nondiverse defendant as fraudulently joined and denying plaintiff's motion to remand to state court presented questions of law, reviewed de novo.

[2] REMOVAL OF CASES ⚡ **36**

334k36

To establish that nondiverse defendant has been fraudulently joined to defeat diversity jurisdiction, removing party must prove that there has been outright fraud in plaintiff's pleading of jurisdictional facts, or that there is absolutely no possibility that plaintiff will be able to establish cause of action against nondiverse defendant in state court.

[2] REMOVAL OF CASES ⚡ **107(7)**

334k107(7)

To establish that nondiverse defendant has been fraudulently joined to defeat diversity jurisdiction,

removing party must prove that there has been outright fraud in plaintiff's pleading of jurisdictional facts, or that there is absolutely no possibility that plaintiff will be able to establish cause of action against nondiverse defendant in state court.

[3] REMOVAL OF CASES ⚡ **36**

334k36

Plaintiff insured's pleading alleged no actionable facts specific to nondiverse independent insurance agent, even under notice pleading standard, and even considering plaintiff's postremoval affidavit, and therefore, agent was fraudulently joined to defeat diversity jurisdiction; agent had no claims processing responsibility and no decision-making authority with respect to processing of plaintiff's claim or with respect to ultimate denial of claim, plaintiff did not allege that his relationship with agent was "governed or created by" any contract, or that his relationship with agent was otherwise imbued with special characteristics that would give rise to "special relationship" required to impose duty of good faith and fair dealing, and agent's prepurchase statements that insurer would handle claims professionally and her postclaim assurances that she would monitor progress of plaintiff's claim were more in nature of nonactionable puffery than actionable representations of specific material fact. V.A.T.S. Insurance Code, art. 21.21, § 16(a); V.T.C.A., Bus. & C. § 17.50(a)(4).

[4] REMOVAL OF CASES ⚡ **107(7)**

334k107(7)

In reviewing fraudulent joinder claim, court could consider, in addition to plaintiff's petition, his affidavit testimony which was filed with district court before district court's ruling on motion to remand, but only to extent that factual allegations in affidavit clarified or amplified claims actually alleged in amended petition that was controlling when suit was dismissed.

[5] REMOVAL OF CASES ⚡ **107(7)**

334k107(7)

In reviewing fraudulent joinder claim, postremoval filings may not be considered when or to extent that they present new causes of action or theories not raised in controlling petition filed in state court.

[6] INSURANCE ⚡ **3146**

217k3146

Both Texas Insurance Code and Texas Deceptive

Trade Practices Act require proof that defendant's conduct was cause in fact of actual damages. V.A.T.S. Insurance Code, art. 21.21, § 16(a); V.T.C.A., Bus. & C. § 17.50(a)(4).

[6] TRADE REGULATION ⚡6
382k6

Both Texas Insurance Code and Texas Deceptive Trade Practices Act require proof that defendant's conduct was cause in fact of actual damages. V.A.T.S. Insurance Code, art. 21.21, § 16(a); V.T.C.A., Bus. & C. § 17.50(a)(4).

[7] FEDERAL COURTS ⚡830
170Bk830

District court's decision that sanctions in form of attorney fees was appropriate is reviewed for abuse of discretion. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[8] FEDERAL CIVIL PROCEDURE ⚡
2771(15)

170Ak2771(15)
District court did not abuse its discretion in ruling that plaintiff's continued pursuit of his plainly meritless claims against nondiverse defendant in federal court after removal was sanctionable, and in awarding attorney fees incurred defending that fraudulently joined defendant. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[9] INSURANCE ⚡3146
217k3146

Under Texas law, regardless of whether insured submitted sworn proof of loss, insured failed to document burglary losses of sports memorabilia, as required by conditions precedent in homeowner's policy.

[10] INSURANCE ⚡3336
217k3336

Homeowner's insurer did not act in bad faith, under Texas law, in denying insured's claim for burglary losses of sports memorabilia, on ground that insured had not documented his losses; insurer repeatedly extended, with reservation of rights, its own deadlines for insured's compliance, and insured was still unable to provide comprehensible documentation of his loss.

*695 Edward James Westmoreland, Kelly, Sulter, Mount & Kendrick, Houston, TX, for Plaintiff-Appellant.

Warren Royal Taylor, Beth M. Taylor, Amy Marie Evans, Taylor & Taylor, Houston, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD, DAVIS and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Gerry M. Griggs appeals from the district court's orders dismissing defendant Lark P. Blum as fraudulently joined, granting Blum's motion for attorney fees, and granting summary judgment in favor of State Farm Lloyds as to all claims. We affirm.

BACKGROUND

This is an insurance dispute governed by Texas law. Between 1986 and 1992, Griggs maintained a homeowner's insurance policy issued by State Farm Lloyds. Griggs procured the insurance through Blum, who is an independent State Farm Lloyds' agent. At all times relevant to this suit, that policy provided coverage in the amount of \$495,640 for unscheduled personal property and \$49,564 for personal property stored off premises.

Griggs is an avid collector of sports cards and other memorabilia. In December 1992, burglars entered a public storeroom leased by Griggs and absconded with valuable sports memorabilia. The locks on the storeroom were undisturbed, and Griggs did not immediately discover the burglary. Even when Griggs entered the storeroom and began to suspect that at least one box was missing, he was unsure whether it was missing or merely misplaced in another storeroom or in his home. Griggs finally became certain that some of his collection was missing on January 16, 1993, when he observed unique items from his personal collection being offered for sale by other dealers at a large trade show. While at the show, Griggs solicited the help of a Houston Police Officer and began interviewing dealers to determine where the stolen merchandise had been purchased.

That night, while Griggs was at the trade show, his

house was burglarized. This time, the burglars forcibly entered *696 through a rear door and left with a substantial portion of Griggs' collection, as well as personal effects such as jewelry, cameras, and a lap top computer.

Griggs estimates his loss from the burglaries in sports memorabilia alone to be in excess of \$1.2 million, with approximately \$700,000 in sports memorabilia being taken from the storeroom and approximately \$516,000 in sports memorabilia being taken from his home. Griggs reported both burglaries to the police, which resulted in the conviction of at least one person. Griggs also reported both burglaries to State Farm Lloyds as required by the policy.

In February 1993, State Farm Lloyds opened a claim file, Griggs gave a recorded statement concerning his losses, and State Farm Lloyds sent Griggs a letter requesting that he complete an enclosed sworn proof of loss. State Farm Lloyds claims it never received the requested proof of loss from Griggs. In March 1993, Griggs notified State Farm Lloyds that he was in the process of documenting what he knew to be stolen, as well as attempting to recover stolen memorabilia. State Farm Lloyds replied that Griggs' claim file remained open pending receipt of the required documentation of his losses.

In April 1993, Griggs again notified State Farm Lloyds that he was attempting to recover stolen property and requested their assistance in recovering property out of state. In June 1993, State Farm Lloyds responded that it encouraged but was unable to assist Griggs' efforts to recover out-of-state property, and that State Farm Lloyds could not process Griggs' claim until Griggs returned a sworn proof of loss and some documentation of his loss. The next month, in July 1993, State Farm Lloyds advised Griggs that it was closing his claim file because Griggs had not forwarded any information about his known losses. State Farm Lloyds informed Griggs that it would be happy to reopen the file when Griggs was able to provide the requested documentation.

Six months later, in January 1994, and again in March 1994, Griggs informed State Farm Lloyds that he was still trying to recover stolen property. In July 1994, one year after his claim file was

closed, Griggs advised State Farm Lloyds that he would soon be ready to provide State Farm Lloyds with information about his known losses.

In August 1994, more than nineteen months after his original loss, Griggs delivered three boxes of documentation to the State Farm Lloyds office. Griggs purported to include, among other things, a sworn proof of loss, and inventories of the stolen property with estimated values. A State Farm Lloyds employee signed for the boxes. State Farm Lloyds claims it never received the proof of loss, and Griggs was unable to produce a copy of any proof of loss during the discovery phase of this lawsuit.

The following summer, in July and August 1995, State Farm Lloyds assigned a new claims representative, who contacted Griggs about his claim. That representative again requested that Griggs provide a sworn proof of loss. Griggs claims he returned two sworn proofs of loss on the required forms. Despite State Farm Lloyds' discovery request, Griggs never produced copies of those sworn proof of loss forms until shortly before the district court granted summary judgment in favor of State Farm Lloyds. Copies of those documents are in the summary judgment record, but do not reflect any notary's seal. State Farm Lloyds claims that the sworn proof of loss forms were never received.

In September 1995, State Farm Lloyds informed Griggs that the sworn proof of loss forms were never received, and requested that he forward additional information, including completed personal property inventory forms (provided by State Farm Lloyds) and supporting documentation. Griggs received the letter in October 1995, and informed State Farm Lloyds that the information was being copied by a third party.

*697 In November 1995, Griggs and the assigned claims agent arranged to meet to discuss Griggs' documentation. The State Farm Lloyds agent missed two scheduled meetings. Later that month, another State Farm Lloyds representative sent Griggs a reservation of rights letter indicating that State Farm Lloyds had not received required and requested documentation, and that State Farm Lloyds was not waiving any rights arising from Griggs' failure to comply with policy terms requiring him to document his loss.

In December 1995, Griggs met with State Farm Lloyds representative to review the status of his claim. State Farm Lloyds explained to Griggs the documentation of items stolen and their values that was required to process his claim. In mid-December 1995, three years after the loss, Griggs provided State Farm Lloyds with an inventory of the items stolen. The inventory was not provided on the standardized forms provided by State Farm for the purpose, but was instead compiled using a variety of undecipherable and inconsistent recording systems. State Farm Lloyds hired an accountant and a sports card expert to interpret the Griggs inventories. Sample pages in the summary judgment record from the approximately 1,000 page inventory do not ascribe values or cost bases to the items cryptically described. Moreover, the inventory apparently reflects all of Griggs' collection without delineating which items were stolen, which had been recovered, and which were still missing. State Farm Lloyds' accountant asked for a variety of documents that would help to substantiate Griggs' claim. Griggs refused to tender all of the documents, but did give the accountant twenty boxes of personal financial records, which contained everything from receipts for dry cleaning to receipts for cards that were not being reported stolen. At some point, the accountant reduced the Griggs inventories to spreadsheet form, which revealed that the inventories contained duplicative pages and both duplicative and illegible entries. Neither State Farm Lloyds nor the experts hired for the purpose were able to document Griggs' claim for him from the materials provided.

On January 22, 1996, State Farm Lloyds sent Griggs a detailed letter by certified mail advising Griggs that he had not complied with his duties under the policy to provide a sworn proof of loss, an accurate inventory with supporting documentation, and access to all of the pertinent records and documents. The State Farm Lloyds policy provides, in relevant part:

3. YOUR DUTIES AFTER LOSS. In case of a loss to covered property caused by a peril insured against, you must:

d. furnish a complete inventory of damaged personal property showing the quantity, description and amount of loss. Attach all bills, receipts and related documents which you have that justify the figures in the inventory.

e. as often as we reasonably require:

* * *

(2) provide us with pertinent records and documents that we request and permit us to make copies.

f. send to us or our agent, if we request, your signed sworn proof of loss within 91 days of our request on a standard form supplied by us.

There is no dispute about the fact that the policy is worded in such a way that the insured's compliance with each of these duties is a condition precedent to coverage.

State Farm Lloyds informed Griggs that, notwithstanding Griggs' failure to respond to requests made in February 1993, June 1993, June 1995, and November 1995 for a sworn proof of loss, State Farm Lloyds was willing to extend the deadline for filing a sworn and notarized proof of loss one final time. The letter unequivocally stated that Griggs would have ninety-one days from the date he received the certified letter to file a sworn proof of loss. *698 State Farm Lloyds further explained why the inventories submitted to State Farm Lloyds by Griggs did not conform to policy requirements, and cautioned Griggs to include an itemized listing of the items stolen with individual values, and where possible, supporting documentation for either Griggs' cost basis or the estimated value at time of loss. Finally, State Farm Lloyds described in detail the types of documentation that it needed to review to process Griggs' claim, including copies of invoices or canceled checks reflecting the purchase of such items, and any independent evaluations or appraisals of the collection. State Farm Lloyds explained, in admirable detail, why such documentation was necessary for the processing of Griggs' sizable claim, and gratuitously permitted Griggs another ninety-one days in which to comply. A sworn proof of loss form was attached to the letter.

On April 9, 1996, State Farm Lloyds sent another certified letter to Griggs informing him that his sworn proof of loss and related documentation were due to be filed with State Farm Lloyds by April 23, 1996. Griggs responded on April 22 that he could not comply with the sworn proof of loss requirement because he did not have the required form. Griggs responded to the remaining provisions by providing State Farm Lloyds' with a half-page summary describing his loss and a batch of unsorted personal

records. Although Griggs was able to present an exact dollar estimate of his loss, Griggs did not provide comprehensible paperwork substantiating his calculation of that loss.

On May 20, 1996, State Farm Lloyds sent Griggs another certified letter stating that Griggs' half page summary of loss, combined with the cumbersome inventories and unsorted financial records, were not adequate under the policy to satisfy Griggs' duties under the policy to document his losses. The May 20, 1996 letter provided another sworn proof of loss form for Griggs' use, but expressly reserved any rights State Farm Lloyds may have as a result of Griggs' non-compliance. One month later, on June 20, 1996, State Farm Lloyds provided Griggs with notice that it was denying his claims because Griggs failed to comply with his contractual duties to provide a sworn proof of loss, to produce an accurate and itemized inventory of the items stolen, and to permit reasonable access to records and documentation in support of his claim.

PROCEDURAL HISTORY

Griggs filed this suit against State Farm Lloyds and Blum in Texas state court. Griggs amended his petition before serving either State Farm Lloyds or Blum. Shortly thereafter, Griggs served State Farm Lloyds. Blum was never served. State Farm Lloyds then timely removed the case, alleging diversity jurisdiction.

Griggs and Blum are both citizens of Texas. State Farm Lloyds is for jurisdictional purposes a citizen of Illinois. State Farm Lloyds' removal petition alleged that diversity jurisdiction was proper, notwithstanding the fact that Griggs and Blum are both Texas residents, because Blum was fraudulently joined. State Farm Lloyds thereafter moved to dismiss Blum as fraudulently joined, and Griggs joined issue by moving for remand to state court.

In October 1997, the district court held a hearing on the propriety of State Farm Lloyds' removal. In the course of that hearing, the district court entered an oral finding that Blum was fraudulently joined. The district court also invited State Farm Lloyds to file a motion seeking to recover its attorney fees to the extent they were expended defending Blum against the fraudulent claims. The district court thereafter entered orders dismissing Blum as fraudulently

joined and denying Griggs' motion to remand, ordering Griggs to pay Blum's attorney fees in the amount of \$4,725, and holding that diversity jurisdiction was proper.

Griggs appeals from these holdings.

*699 ORDER DENYING GRIGGS' MOTION TO REMAND

I.

[1][2] The district court's orders dismissing Blum and denying Griggs' motion to remand to state court present questions of law, which we review de novo. *Burden v. General Dynamics Corp.*, 60 F.3d 213, 216 (5th Cir.1995). To establish that a non-diverse defendant has been fraudulently joined to defeat diversity jurisdiction, the removing party must prove that there has been outright fraud in the plaintiff's pleading of the jurisdictional facts, or that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the non-diverse defendant in state court. *Burden*, 60 F.3d at 217; *Cavallini v. State Farm Mutual Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir.1995). There is no dispute concerning the fact that both Griggs and Blum are Texas residents. Consequently, our sole concern is whether, as a matter of law, Griggs has alleged a valid state-law cause of action against Blum. *Burden*, 60 F.3d at 217-18; *Cavallini*, 44 F.3d at 259. Stated differently, we must determine whether there is any reasonable basis for predicting that Griggs might be able to establish Blum's liability on the pleaded claims in state court. *Burden*, 60 F.3d at 217; *Cavallini*, 44 F.3d at 262 n. 13. In making this legal determination, we are obliged to resolve any contested issues of material fact, and any ambiguity or uncertainty in the controlling state law, in Griggs' favor. *Burden*, 60 F.3d at 217-18; *Cavallini*, 44 F.3d at 259.

II.

[3] Griggs' original and amended petitions name Lark Blum as a defendant, but allege no actionable facts specific to Blum. The only factual allegation even mentioning Blum merely states that "Defendants [sic], through its local agent, Lark Blum issued an insurance policy." The remainder of Griggs' pleadings refer to conduct by the "Defendants" that can in no way be attributed to Blum. Both Griggs' factual allegations and his

articulation of his legal claims focus solely upon State Farm Lloyds' conduct in the processing and ultimate denial of his claim.

Griggs argues that his amended petition adequately states valid causes of action against Blum, pointing out that Texas law requires only notice pleading. See Tex.R. Civ. P. 45, 47. We decline Griggs' invitation to expand the concept of notice pleading this far. See *City of Alamo v. Casas*, 960 S.W.2d 240, 251-52 (Tex.App.--Corpus Christi 1997, writ denied) (The petition must at least provide sufficient factual information that the defendant is able to prepare a defense). We cannot say that Griggs' petition, which mentions Blum once in passing, then fails to state any specific actionable conduct on her part whatsoever, meets even the liberalized requirements that permit notice pleading. *Id.* at 251-52 (holding that petition failed to state a claim based upon factual insufficiency). Moreover, we note that notwithstanding Blum's identity as a defendant, Griggs did not make any attempt to serve Blum with either the original or the amended petition. In the district court, Griggs' counsel initially represented that there had been some difficulty achieving service of process, but later abandoned that assertion when State Farm Lloyds produced evidence that Blum had been in the same business location for twelve years and that Griggs had been to that location on several occasions. We conclude that Griggs' pleadings, standing alone, do not set forth actionable claims against Blum. Moreover, the record does not support any inference that Griggs intended to actively pursue claims against Blum.

III.

[4] Griggs argues that the Court may consider, in addition to his petition, his affidavit testimony, which was filed with the district court before the district court's ruling on the motion to remand. State *700 Farm Lloyds maintains that post-removal evidence may not be considered when determining whether removal was proper. Griggs has the better end of this argument, but only to the extent that the factual allegations in his affidavit clarify or amplify the claims actually alleged in the amended petition that was controlling when the suit was dismissed.

[5] Our Court has endorsed a summary judgment-like procedure for reviewing fraudulent joinder

claims. Thus, "[w]hile we have frequently cautioned the district courts against pretrying a case to determine removal jurisdiction," a federal court may consider "summary judgment-type evidence such as affidavits and deposition testimony" when reviewing a fraudulent joinder claim. *Cavallini*, 44 F.3d at 263. Post-removal filings may not be considered, however, when or to the extent that they present new causes of action or theories not raised in the controlling petition filed in state court. *Cavallini*, 44 F.3d at 263. With that rule in mind, we will consider Griggs' affidavit, to the extent material, for purposes of determining whether there is any reasonable basis for predicting that Griggs might be able to establish Blum's liability on the pleaded claims in state court. See *Burden*, 60 F.3d at 217; *Cavallini*, 44 F.3d at 262.

Griggs' affidavit adds to his petition in two ways. First, Griggs alleges that Blum made the sort of pre-purchase assurances to be expected from an insurance agent. For example, Blum is alleged to have said that State Farm Lloyds would provide timely and professional service, and that she, Blum, would personally handle any questions or problems that might arise. Although none of these facts appear in his state court petition, Griggs also alleged that Blum made certain representations concerning the claim at issue in this case. Specifically, Griggs alleged that Blum promised to follow up on his claim, promised to get a competent adjustor assigned to the file, represented that the delay attendant to his independent efforts to retrieve his collection would not prejudice the processing of his claim, represented that State Farm Lloyds "had everything" they needed to process his claim, and represented that his claims would be paid quickly.

Having defined the universe of factual allegations that may be considered, we assess whether there is a reasonable basis for predicting that Griggs would be able to establish Blum's liability on the state-law theories pleaded in his amended petition.

IV.

Griggs' original and amended state court petitions allege breach of the insurance contract, breach of the common law duty of good faith and fair dealing, and violations of the Texas Insurance Code and the Texas Deceptive Trade Practices Act. Neither Griggs' pleadings nor his affidavit allege that Blum

was a party to any implied or express contract of any sort with Griggs. Moreover, it is undisputed that Blum had no claims processing responsibility and no decision-making authority with respect to the processing of Griggs' claim or with respect to State Farm Lloyds' ultimate denial of Griggs' claim. There is, therefore, no basis for Griggs' claim alleging that Blum breached the insurance contract.

Griggs next claims that Blum can be held liable for breach of the duty of good faith and fair dealing. "[I]n an insurance context, the duty of good faith and fair dealing arises only when there is a contract giving rise to a 'special relationship.'" *Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 698 (Tex.1994); see also *Cavallini*, 44 F.3d at 262 (under Texas law, "the existence of a contract, giving rise to a special relationship, is a necessary element of the duty of good faith and fair dealing" (internal quotations omitted)); *Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566 (Tex.1990) (the duty of good faith and fair dealing arises "from an obligation imposed in law as a result of a special relationship *701 between the parties governed or created by a contract" (internal quotations omitted)); *Coffman v. Scott Wetzel Servs., Inc.*, 908 S.W.2d 516, 516 (Tex.App.-Fort Worth 1995, no writ) (citing *Natividad* for the proposition that no duty of good faith and fair dealing is owed by an agent to the insured absent privity of contract). Once again, Griggs has not alleged that his relationship with Blum was "governed or created by" any contract, or that his relationship with Blum was otherwise imbued with special characteristics that would give rise to the "special relationship" required to impose a duty of good faith and fair dealing. See *Cavallini*, 44 F.3d at 261-62; *Viles*, 788 S.W.2d at 567. There is, therefore, no basis under Texas law for Griggs' claim against Blum for breach of the duty of good faith and fair dealing.

Griggs maintains that he has alleged viable claims against Blum under article 21.21 § 16(a) of the Texas Insurance Code and § 17.50(a)(4) of the Texas Deceptive Trade Practices Act. Article 21.21 § 4 of the Texas Insurance Code provides an extensive list of acts or practices forbidden as unfair or deceptive in the business of insurance. Tex. Ins.Code Ann. art. 21.21 § 4 (Vernon Supp.1999). Section 17.46 of the Texas Deceptive Trade Practices Act provides an extensive list of acts or practices that are forbidden in all businesses as

unfair or deceptive. Tex. Bus. & Com.Code Ann. § 17.46 (Vernon Supp.1999). Both the Texas Insurance Code and the Texas Deceptive Trade Practices Act permit a private cause of action against "any person" who commits one of the prohibited acts or practices. See Tex. Ins.Code Ann. article 21.21 § 16 (Vernon Supp.1999); Tex. Bus. & Com.Code Ann. § 17.50 (Vernon Supp.1999). Texas courts have recently recognized that the statutory language is broad enough to permit in the appropriate circumstances a cause of action against an insurance agent who engages in unfair or deceptive acts or practices. In the two most prominent cases, *Liberty Mutual Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482 (Tex.1998) and *State Farm Fire & Casualty Co. v. Gros*, 818 S.W.2d 908 (Tex.App.--Austin 1991, no writ), Texas courts acknowledged that a sales agent may be individually liable when the agent misrepresents specific policy terms prior to a loss, and the insured's reliance upon that misrepresentation actually causes the insured to incur damages. See *Garrison*, 966 S.W.2d 482 (agent misrepresented the amount of premium due under the policy); *Gros*, 818 S.W.2d 908 (agent misrepresented that damage to home from mudslide was covered under homeowner's policy).

Griggs argues that the mere possibility that such a claim can be stated requires the conclusion that he has stated a valid claim in this case. We disagree. While the burden of demonstrating fraudulent joinder is a heavy one, we have never held that a particular plaintiff might possibly establish liability by the mere hypothetical possibility that such an action could exist. To the contrary, whether the plaintiff has stated a valid state law cause of action depends upon and is tied to the factual fit between the plaintiffs' allegations and the pleaded theory of recovery. See *Burden*, 60 F.3d at 218-221; see also *Casas*, 960 S.W.2d at 251-52.

No facts warranting liability exist here. As an initial matter, we note that Blum's pre-purchase statements that State Farm Lloyds would handle Griggs' claims professionally, as well as her post-claim assurances that she would monitor the progress of Griggs' claim, are more in the nature of non-actionable puffery than actionable representations of specific material fact. See *Hedley Feedlot, Inc. v. Weatherly Trust*, 855 S.W.2d 826, 838 (Tex.App.- Amarillo 1993, writ denied)

(discussing puffery defense to misrepresentation claim). The record contains ample evidence that Griggs is both a well educated gentleman and an unusually sophisticated insured. Griggs has filed a large number of claims that have been processed, according to State Farm Lloyds' procedures, by the *702 insurance company itself. Moreover, Griggs has documented extensive and specific communication about the status and progress of his claim with the State Farm Lloyds personnel with the authority and responsibility for processing his claim. Griggs' own evidence establishes that State Farm Lloyds repeatedly forwarded certified letters return receipt requested notifying Griggs that they needed additional documentation, and that the company was reserving its rights under the policy. Thus, Griggs was made expressly aware in specific terms of the insurance company's position by the very personnel responsible for processing his claim and reaching a decision. When compared to this documentation, Blum's general, undocumented and non-specific statements clearly fall short of the mark of actionable representations under Texas law.

[6] In addition, both the Insurance Code and the Deceptive Trade Practices Act require proof that the defendant's conduct was the cause in fact of actual damages. *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189, 192 (Tex.1998) (Insurance Code); *2 Fat Guys Inv., Inc. v. Klaver*, 928 S.W.2d 268, 272 (Tex.App.--San Antonio 1996, no writ). Griggs claims to have been injured by State Farm Lloyds' failure to pay his claim. This is not a case like *Garrison* or *Gros*, in which the plaintiff identifies a particular representation which is causally connected to the damages sustained. Griggs' Insurance Code and Deceptive Trade Practices Act claims fail because there is no conceivable basis in law or fact upon which Blum's non-specific statements can be construed as actionable representations that caused the injury alleged by Griggs.

For the foregoing reasons, there is no basis in Texas law or in fact for Griggs' claims against Blum. The district court did not err in denying Griggs' motion to remand.

ORDER AWARDING ATTORNEY FEES

The district court awarded State Farm Lloyds the attorney fees incurred defending Blum against the fraudulent claims. The district court held that

Griggs' continued pursuit of his plainly meritless claims against Blum in federal court after removal was sanctionable conduct under Federal Rule of Civil Procedure 11. Griggs challenges this decision on appeal, essentially arguing that the award of fees was improper because Blum was not fraudulently joined.

[7][8] The district court's decision that sanctions in the form of attorney fees was appropriate is reviewed for an abuse of discretion only. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990); *Thornton v. General Motors Corp.*, 136 F.3d 450, 454 (5th Cir.1998). In light of our agreement with the district court that Blum was fraudulently joined, the record of the proceedings below, and the deferential standard governing our review of this issue, we are unable to conclude that the district court abused its discretion by awarding attorney fees in this case. The district court's order granting Blum's motion for attorney fees is affirmed.

ORDER GRANTING STATE FARM LLOYDS' MOTION FOR SUMMARY JUDGMENT

Griggs maintains that the district court erred by granting summary judgment in favor of State Farm Lloyds because there are genuine issues of material fact about whether he complied with conditions precedent to coverage and whether State Farm Lloyds had a good faith basis for denying his claim. State Farm Lloyds responds that the summary judgment record is adequate to demonstrate its policy defense and its good faith as a matter of law.

[9][10] We have reviewed the extensive summary judgment record, including *703 the numerous exhibits submitted by Griggs, and find no error in the district court's disposition. We agree with Griggs that there is a genuine factual dispute concerning whether Griggs submitted a sworn proof of loss. But no reasonable trier of fact could find that Griggs documented his losses as required by conditions precedent in the applicable insurance policy. Absent Griggs' compliance with this independently sufficient condition precedent to coverage, State Farm Lloyds had no duty to provide benefits under the contract. Likewise, no reasonable trier of fact could find that State Farm Lloyds' handling of Griggs' claim was characterized by bad faith. State Farm Lloyds repeatedly extended, with reservation of rights, its own deadlines for Griggs'

compliance. Indeed, Griggs is still unable to provide comprehensible documentation of his loss. The district court closely supervised discovery in this case, ordering State Farm Lloyds to provide an itemized list of the required documentation and ordering Griggs to produce some reasonably comprehensible proof of his loss. Even at that late date, State Farm Lloyds indicated some willingness, at the district court's urging, to consider Griggs' claim if properly documented. Notwithstanding further meetings between the parties, and the personal examination of the available documentation by the district court at a hearing in which Griggs' counsel was permitted to explain the documentation, no one, including Griggs' own lawyer, was able to explain how any particular page in the thousands of

pages tendered by Griggs proved any aspect of his claimed loss.

State Farm Lloyds is not liable as a matter of law on Griggs' claims under Texas common law, the Texas Insurance Code or the Texas Deceptive Trade Practices Act. The district court's grant of summary judgment in favor of State Farm Lloyds is in all respects affirmed.

CONCLUSION

For the foregoing reasons, the district court is in all respects AFFIRMED.

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