

Affirmed and Opinion filed April 26, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-01084-CV

**EQUITAS REINSURANCE LTD., EQUITAS LTD., AND
EQUITAS MANAGEMENT SERVICES LTD., Appellants**

V.

**BROWNING-FERRIS INDUSTRIES, INC.; BROWNING-FERRIS INDUSTRIES,
INC. (MA); BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.;
BROWNING-FERRIS INDUSTRIES OF CONNECTICUT, INC.; BROWNING-
FERRIS INDUSTRIES OF FLORIDA, INC.; BROWNING-FERRIS INDUSTRIES OF
ILLINOIS, INC.; BROWNING-FERRIS INDUSTRIES OF NEW YORK, INC.;
BROWNING-FERRIS INDUSTRIES OF OHIO, INC.; BROWNING-FERRIS
INDUSTRIES OF PUERTO RICO, INC.; BROWNING-FERRIS INDUSTRIES OF
TENNESSEE, INC.; BROWNING-FERRIS INDUSTRIES LTD.; BROWNING-
FERRIS, INC. (MD); BROWNING-FERRIS CHEMICAL SERVICES, INC.; BFI
WASTE SYSTEMS OF NEW JERSEY, INC.; BFI WASTE SYSTEMS OF NORTH
AMERICA, INC.; CECOS INTERNATIONAL, INC.; AND
WOODLAKE SANITARY SERVICE, INC., Appellees**

**On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 98-56362**

OPINION

Equitas Reinsurance Ltd., Equitas Ltd., and Equitas Management Services Ltd., appeal from the denial of their special appearance. Because we find that appellants have not met their burden of negating all bases of asserting specific jurisdiction, we affirm the judgment of the court below.

I. Background

This case involves a series of claims asserted by appellees, here collectively called BFI, against various Lloyd's Underwriters and appellants, the Equitas companies.¹ Unless otherwise indicated, the Equitas companies will be referred to herein as Equitas.

Lloyd's, an insurance marketplace in London, does not itself underwrite insurance. Rather, individuals, called "Names," join into syndicates to insure various risks. The Names provide the underwriting capital and maintain unlimited individual liability. An operating period for a syndicate generally is three years. At the end of the period, syndicate managers determine the syndicate's profits, losses, and estimated outstanding liabilities. The outstanding liabilities then are reinsured by another syndicate. Through this process, called "reinsurance to close," a syndicate can close its books. For the system to work, however, the syndicate managers must be able to estimate accurately a closing syndicate's outstanding liabilities. If the managers cannot, each Name within the syndicate remains liable on a proportionate share of the risk and the syndicate is not able to close its books.

In the mid- to late 1980s, due to various natural and man-made disasters and asbestos-

¹ The five Equitas companies are Equitas Ltd., Equitas Reinsurance Ltd., Equitas Management Services Ltd., Equitas Holdings Ltd., and Equitas Policyholders Trustee Ltd. Equitas Reinsurance entered into the Reinsurance and Run-Off Contract with the Lloyd's Underwriters and then transferred the reinsurance business to Equitas Ltd., which is the primary operating company within Equitas. Equitas Management provides management services to the other Equitas companies. Equitas Holding is a holding company, and Equitas Policyholders Trustee is a dormant trust company. BFI has abandoned its jurisdictional claims over Equitas Holding and Equitas Policyholders Trust.

related claims, claims against insurance policies began to outpace premiums collected. Syndicates began having difficulty reinsuring to close through other syndicates. Litigation ensued between the Names and the Lloyd's Underwriters. In an effort to address the Names' liability with respect to pre-1993 losses and to resolve the litigation between the Names and the underwriters, Lloyd's developed a plan to restore market integrity. Lloyd's formed the Equitas companies to handle those reinsurance-to-close functions that previously would have been handled by other Lloyd's syndicates.

As part of the program, Equitas, in exchange for a premium, reinsured the syndicates' losses before and through 1992. Equitas also agreed to perform various claims-handling functions, such as settlement and adjustment of all future and outstanding claims for which Equitas reinsured the Names. *For background see generally Employers Ins. of Wausau v. Certain London Market Cos.*, No. 97-C-0409-C, 1997 WL 1134980 (W.D. Wis. Oct. 27, 1997) and 14 ERIC MILLS HOLMES & L. ANTHONY SUTIN, HOLMES' APPLEMAN ON INSURANCE 2D § 106.7.F (1999).

This case is one of many filed nationwide concerning Equitas in which Equitas has challenged the courts' exercise of personal jurisdiction. Courts are divided on the issue. Cases in which courts have asserted personal jurisdiction over Equitas include *Central Maine Power Co. v. Ernest A. Moore*, No. CV-93-489 (Me. Super., Kennebec Co. Jan 11, 2000); *Employers Mut. Cas. Co. v. Owens Ins., Ltd.*, No. MRS-C-51-96 (N.J. Super. Nov. 10, 1999); *Unisys Corp. v. Ins. Co. of N. Am.*, No. L-1434-94S (N.J. Super., Middlesex Co. Dec. 7, 1999); *Employers Ins. of Wausau v. Certain London Mkt. Cos.*, 1997 WL 1134980, 97-C-0409-C (W.D. Wis. Oct. 27, 1997). Cases in which courts have declined to assert jurisdiction over Equitas include *Millennium Petrochemicals v. C.G. Jago*, 50 F. Supp. 2d 654 (W.D. Ky. 1999); *Malone v. Equitas Reinsurance Ltd.*, 101 Cal. Rptr. 2d 524 (Cal. Ct. App. 2000); *Union Pac. R.R. Co. v. Equitas, Ltd.*, 987 P.2d 954 (Colo. App. 1999); *B.F. Goodrich v. Commercial Union Ins. Co.*, No. CV 9902 0410, slip op. (Ct. Common Pleas, Summit Cty., Ohio Oct. 14, 1999); *Boeing Corp. v. Certain Underwriters at Lloyd's*, No. 99-2-03873 SEA,

slip op. (Sup. Ct., King Cty., Wash. Nov. 23, 1999, and Dec. 16, 1999); and *Archdiocese of Milwaukee v. Certain Underwriters at Lloyd's, London*, No. 96-CV-00662, slip op. (Cir. Ct. Milwaukee Cty., Wis. July 13, 1999).

Generally, Equitas has argued that it is a mere reinsurer of the original underwriters and that its connections with the various forum states are too tenuous for courts to constitutionally exercise personal jurisdiction. For their part, many of the various plaintiffs argue that Equitas has assumed control over the insurance policies and that it has stepped into the shoes of the underwriters.

In the suit here at issue, BFI sued various underwriters in connection with BFI's insurance coverage under Lloyd's policies issued during the 1960s, '70s, and '80s. BFI has alleged breach of contract against the underwriters. Against Equitas, BFI has alleged breach of the duty of good faith and fair dealing and violations of the Texas Insurance Code. The underwriters remain parties to the suit below. Equitas filed a special appearance asserting that the trial court had no personal jurisdiction over it. The trial court denied the special appearance.

II. Discussion

On appeal, Equitas advances its complaint that the trial court erred in finding it had personal jurisdiction. Equitas argues the trial court lacks general jurisdiction because Equitas does not conduct continuous and systematic business activities in the forum state. It argues further that the trial court lacks specific jurisdiction because the claims-handling activities upon which BFI relies are not actionable as to Equitas and that these activities, therefore, cannot sustain an exercise of specific personal jurisdiction. The companies also argue that subjecting Equitas to suit in a Texas court would violate the constitutional concept of fair play.

The plaintiff has the initial burden of pleading allegations sufficient to bring the nonresident defendant within the provision of the Texas long-arm statute. *C-Loc Retention Sys., Inc. v. Hendrix*, 993 S.W.2d 473, 476 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

The defendant contesting the assertion of personal jurisdiction has the burden of negating all bases of asserting jurisdiction. *Id.* The determination of whether the court may assert personal jurisdiction over a nonresident is a question of law, but the court may resolve factual disputes in its determination. *Id.* We review the resolution of those factual disputes using the same standard we use in reviewing the factual sufficiency of the evidence. *Id.* We consider all the evidence in the record. *Id.* If the special appearance is based on undisputed and established facts, we conduct a de novo review of the trial court's order denying the special appearance. *Id.* We presume the court below made findings sufficient to support the judgment. *Id.*

For a Texas court to exercise personal jurisdiction over a nonresident defendant, (1) the state's long-arm statute must authorize the exercise of jurisdiction and (2) the exercise of jurisdiction must comport with federal and state due-process guarantees. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex. 1990). The long-arm statute authorizes a court to exercise personal jurisdiction over a nonresident defendant "doing business" in the state. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1997). A tort committed in whole or in part in the state is deemed to be doing business in the state for purposes of acquiring jurisdiction. *Id.* The "doing business" requirement allows the statute to reach as far as the federal constitutional requirements of due process will allow. *Guardian Royal Exchange Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991). For purposes of a court's exercise of personal jurisdiction, due process comprises two components: (1) whether the nonresident defendant has purposefully established minimum contacts with the forum state, and (2) if so, whether the exercise of jurisdiction comports with fair play and substantial justice. *Id.* A nonresident defendant who has purposefully availed itself of the privileges and benefits of conducting business in the forum state has sufficient contacts with the forum to confer personal jurisdiction on the court. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996).

A nonresident defendant's contacts can give rise to two types of jurisdiction, general and specific. *Id.* General jurisdiction may be asserted when the cause of action does not arise from or relate to the nonresident defendant's purposeful conduct within the forum state but

there are continuous and systematic contacts between the nonresident defendant and the forum state. *Id.* Specific jurisdiction is established when the plaintiff's cause of action arises out of, or relates to, the defendant's contacts with the forum state. *Guardian Royal Exchange*, 815 S.W.2d at 228. The defendant's actions must have been purposefully directed toward the forum state. *Id.* Under specific jurisdiction, the minimum contact analysis focuses on the relationship among the defendant, the forum, and the litigation. *Id.*

In connection with general jurisdiction, Equitas argues that it has no systematic and continuous contacts with the forum state sufficient to permit the exercise of general jurisdiction. Because we find that Equitas has not met its burden of negating all bases of asserting specific jurisdiction, we need not address the question of general jurisdiction. In this case, Equitas does not seem to argue that it does not have sufficient contacts to establish specific jurisdiction. Rather, in connection with specific jurisdiction, it argues that (1) the claims-handling activities upon which BFI relies to assert jurisdiction are not actionable, (2) the Insurance Code does not provide an insured with a cause of action against a reinsurer, and (3) the Insurance Code specifically exempts reinsurance from the definition of the "business of insurance."

A. Claims-handling activities actionable

Equitas argues that the court may not exercise specific jurisdiction because BFI asserts no cognizable cause of action against Equitas. It argues that the actions upon which a plaintiff relies to establish specific jurisdiction must be actionable. The claims asserted by BFI are violations of the common-law duty of good faith and violations of the Insurance Code. Equitas argues that the duty of good faith arises from the special relationship that exists only because the insured and the insurer are parties to a contract that is the result of unequal bargaining power. *Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 698 (Tex. 1994). Because Equitas is not the original insurer, but a reinsurer and claims-handling agent, it owes no duty of good faith to the original insured. *Id.* Further, Equitas argues that without a common-law bad-faith cause

of action, there can be no statutory bad-faith cause of action under the Insurance Code. *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 72 (Tex. 1997).

Because we determine that BFI asserts recognized causes of action under the Insurance Code apart from any claim grounded in the common-law duty of good faith, we do not address the issue of whether a common-law good-faith claim exists against Equitas. In its second amended petition, BFI asserts various bad faith actions and unfair settlement practices in violation of the Insurance Code. BFI accuses Equitas of failing to attempt in good faith to effectuate prompt, fair, and equitable settlement of claims with respect to which liability has become reasonably clear, TEX. INS. CODE ANN. art. 21.21, § 4(10)(iii) (Vernon Supp. 2000); failing to provide promptly to BFI a reasonable explanation of the basis in the policy, in relation to facts or applicable law, for any denial of or refusal to pay BFI's claims, art. 21.21, § 4(10)(iv); failing within a reasonable time to affirm or deny coverage of BFI's claims, art. 21.21, § 4(10)(v); refusing to pay claims without conducting a reasonable investigation with respect to the claims, art. 21.21, § 4(10)(viii); and representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, TEX. COM. & BUS. CODE ANN. § 17.46(b)(12)(Vernon Supp. 2000); TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon Supp. 2000).

The Insurance Code prohibits any person, including adjusters, from engaging in unfair or deceptive acts in the "business of insurance." Art. 21.21, §§ 2, 3 (Vernon 1981 & Supp. 2000). Under the Insurance Code, a "person," engaged in the "business of insurance" may be sued for unfair settlement practices. Art. 21.21, § 2; *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 487 (Tex. 1998). The code does not limit liability to companies in contractual privity with the insured. *See Liberty Mutual*, 996 S.W.2d at 487 (finding that article 21.21's definition of "person" includes insurer's employee-agent).

Here, Equitas acknowledges that it is acting as an adjuster for the underwriters. The Insurance Code makes actionable an enumerated list of unfair claims-settlement practices.

See art. 21.21., § 4 (10). When BFI alleges that Equitas, as adjuster, has engaged in certain unfair claim-settlement practices, BFI has made actionable claims. Such actionable claims will support a finding of specific jurisdiction. Equitas's reliance on *Stewart Title* is misplaced. The court in *Stewart Title* was interpreting a version of the Insurance Code predating the 1995 amendment that enumerated prohibited deceptive settlement practices. See Act May 17, 1995, 74th Leg., R.S., ch. 414, § 11, 1995 Tex. Gen. Laws 2988, 2999 (now TEX. INS. CODE ANN. art. 21.21, § 4(10) (Vernon Supp. 2000)). Moreover, even if we were to agree that a party cannot assert a bad-faith claim under the Insurance Code in the absence of a common-law bad-faith claim, it does not follow that the Insurance Code prohibits only bad-faith activities. The code prohibits several enumerated deceptive practices, many of them not grounded on a duty of good faith.

B. Equitas as reinsurer

Second, Equitas argues that it is a mere reinsurer and that the Insurance Code does not provide for a cause of action by the original insured against a mere reinsurer. See *Malaysia British Assur. v. El Paso Reyco, Inc.*, 830 S.W.2d 919, 921 (Tex. 1992). We note that commentators and courts disagree about whether Equitas is a mere reinsurer or a successor in interest to the underwriters. One learned authority argues that direct action should be allowed against Equitas because under the reinsurance-to-close arrangement, Equitas does not act as a mere reinsurer but rather has taken up the duties of an “assumption reinsurer,” which traditionally has been held to be liable to the original insured. Holmes & Sutin, § 106.7. Some courts have found otherwise, though. See *Millenium Petrochemicals*, 50 F. Supp. 2d 654.

Under the Insurance Code, a “person does not have any rights against a reinsurer that are not specifically set forth in the contract of reinsurance or in a specific agreement between the reinsurer and the person.” TEX. INS. CODE ANN. art. 5.75–1(g) (Vernon Supp. 2000). In *Malaysia British*, relied upon by Equitas, the reinsurer owed no duties to the original insurer apart from reinsurance duties. Equitas, on the other hand, through the Reinsurance and Run-Off

Contract with the original underwriters, assumed certain claims-handling responsibilities with respect to the original insurers and the insureds. Under the terms of the contract, Equitas has the power (1) to adjust, handle, agree, settle, pay, compromise, or repudiate any claim against the Lloyd's underwriters; (2) to commence, conduct, pursue, prosecute, settle, appeal, or compromise any legal proceedings by or against the Lloyd's underwriters; (3) to engage in any discussion or negotiation with any insured person, reinsured person, class of insured or reinsured persons, reinsurer, broker, legal or other representative of insureds, or any other party in relation to any claim or any other matter; (4) to enter into, amend, or cancel any claims handling arrangement; and (5) to instruct lawyers, claim adjusters, or any other experts or consultants in any matter. Equitas is charged to exercise these powers to the fullest extent possible "as if it were the principal." Moreover, Equitas is "not bound to comply with any instructions" from the underwriters. Indeed, the contract bars the underwriters from interfering with the "management or control" by Equitas. Thus, Equitas, in addition to whatever reinsurance duties it owes to the underwriters, also has assumed certain claim-handling duties. Equitas, therefore, may be liable under the Insurance Code for any deceptive settlement practice it might have committed as an adjuster dealing with the insured. We do not view the Insurance Code as immunizing a party against any allegations of deceptive claims-settlement practices simply because the party may also have certain reinsurance duties.

C. Insurance Code's Reinsurance Exemption

Third, Equitas argues that the court cannot exercise specific jurisdiction because the Insurance Code specifically exempts reinsurers. Thus, it argues, the grounds relied upon for asserting specific jurisdiction are not actionable. Equitas argues that article 1.14-1 of the Insurance Code, in effect at the time, exempts the "lawful transaction of reinsurance by insurers," from the definition of the "insurance business," which, it claims, is an essential element of any cause of action for a violation of any of the listed provisions relied upon by

BFI.²

The Texas Supreme Court has determined that article 1.14–1 of the code was enacted after article 21.21 and deals primarily with the regulation of unauthorized insurers. *See Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 424 (Tex. 1995); *Dagley v. Haag Eng'g Co.*, 18 S.W.3d 787, 792-93 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The Legislature did not intend to impose upon the Insurance Code, including article 21.21, a uniform definition of the “business of insurance.” *See Great American*, 908 S.W.2d at 242; *Dagley*, 18 S.W.3d at 792-93. Article 1.14–1 does not control the definition of “business of insurance” for purposes of determining liability under article 21.21. Thus, even though article 1.14–1 may exempt a “transaction of reinsurance” from the definition of an “insurance business” for purposes of regulating unauthorized insurers, article 1.14–1 does not immunize an adjuster from liability for deceptive claim-settlement practices.

Summarizing, Equitas on appeal argues that the acts relied upon by BFI to establish specific jurisdiction are not actionable and so cannot be used to establish specific jurisdiction. We have determined that BFI does allege actionable claims under the Insurance Code. Equitas has not met its burden of negating all bases of asserting specific jurisdiction.

D. Fair Play and Substantial Justice

Equitas on appeal also argues the fair-play prong of the constitutional test acts as an independent ground for reversal.

In determining whether the exercise of personal jurisdiction comports with fair play and substantial justice, a court weighs several factors, including (1) the burden on the defendant, (2) the interests of the forum state in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in

² *See* Act of May 30, 1993, 73rd Leg., R.S., ch. 685, §§ 3.03, 3.031, 1993 Tex. Gen. Laws 2559, 2576-77 (formerly TEX. INS. CODE art. 1.14–1, §2, current version at TEX. INS. CODE ANN. §§ 101.051, 101.053(b)(2) (Vernon Supp. 2000)).

obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Guardian Royal Exchange*, 815 S.W.2d at 228. When an international dispute is involved, the court also should consider (a) the unique burdens placed upon the defendant who must defend itself in a foreign legal system; and (b) the procedural and substantive policies of other nations whose interests are affected as well as the federal government's interest in its foreign relations policies. *Id.* at 229. Only in rare instances will the exercise of personal jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state. *Id.* at 231.

Drawing from this list of factors, Equitas on appeal relies upon three considerations, as follows: (1) the interests of the state in adjudicating the allegations in the particular dispute; (2) the interest of BFI in pursuing its claims against Equitas in Texas; and (3) the countervailing interests of Equitas in not being forced into court here, “bearing in mind the unique nature of Equitas and the very specific role it was created to fulfill.”

As to the first consideration, Equitas argues that Texas has “zero” interest in refereeing a dispute between BFI and Equitas because BFI alleges tort theories that “do not exist.” As discussed above, BFI has alleged that Equitas, acting as an adjuster, has engaged in various deceptive claim-settlement practices in violation of the state Insurance Code. These causes of action are recognized. Texas does have an interest in preventing deceptive claim-settlement practices in Texas.

As to the second consideration, Equitas argues that BFI’s interest in obtaining effective relief does not require the presence of Equitas because BFI will be able to obtain any needed relief from the underwriters. BFI, based in Texas, has chosen to seek relief in Texas courts against these defendants. Moreover, some of the claims asserted against Equitas seem to be aimed directly at the allegedly deceptive claim-settlement practices engaged in by Equitas as adjuster. Although the underwriters may be liable for such activities under a theory of

respondeat superior, Equitas as adjuster also may be liable for its own activities. Moreover, as discussed above, Equitas, pursuant to the Reinsurance and Run-Off Contracts, has assumed control of the lawsuits involving the underwriters.

As to the third consideration, the burden Equitas would face in defending itself in a Texas lawsuit, Equitas, as mentioned above, is already directing the lawsuit and even if excluded as a defendant likely will continue directing the suit. We do not see that Equitas will be subject to additional substantial hardship by being included as a defendant.

Equitas has not demonstrated that the trial court's exercise of personal jurisdiction over it will violate the fair-play and substantial-justice prong of the constitutional test.

III. Conclusion

We have determined that Equitas has failed to meet its burden of negating all bases of asserting specific jurisdiction. Nor has Equitas demonstrated that the trial court's exercise of personal jurisdiction will violate the fair-play and the substantial-justice prong of the test. Equitas has failed to demonstrate that the trial court erred in finding it had personal jurisdiction over the companies. We affirm the trial court's denial of Equitas's special appearance.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed April 26, 2001.

Panel consists of Senior Chief Justice Murphy and Justices Hudson and Amidei.³

Do Not Publish — TEX. R. APP. P. 47.3(b).

³ Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.