ORAL ARGUMENTS - 10/07/97

96-1013

LIBERTY MUTUAL INS. CO. VS. GARRISON CONTRACTORS

LAWYER: I am here on behalf of Robert Garrett, an individual and his employer, Liberty Mutual Ins. Co. This dispute began when Liberty Mutual filed suit against its insured, Garrison Contractors in order to recover unpaid premium under a retrospective premium insurance plan. Garrison not only filed an answer, but at the same time filed counterclaims against Liberty Mutual Ins. Co. and third party claims against the Liberty Mutual employee, Mr. Robert Garrett.

The TC first granted summary judgment on behalf of Liberty Mutual and Mr. Garrett as to all of the counterclaims and as to the third party action. The TC subsequently granted a summary judgment on behalf of Liberty Mutual on its affirmative claims for the unpaid retrospected premium.

This is an appeal from a decision by the El Paso CA, which reversed part of the summary judgment on behalf of Mr. Garrett and Liberty Mutual as to the counterclaims and the third party action, although it did affirm the summary judgment as to some of the claims. The CA also reversed the summary judgment on behalf of Liberty Mutual for its affirmative claims for the unpaid premium.

We would like to first address the issue as to whether or not the employee of Liberty Mutual, Mr. Robert Garrett, can be individually liable for a claim under §16 of Article 21.21 of the Texas Insurance Code.

In analyzing that issue, it's important to remember that all times relevant to this lawsuit, Mr. Garrett was an employee of Liberty Mutual Insurance Co., acting in the course and scope of his employment. He was not an independent agent, he was not an independent business entity, but at all times he was acting within the course and scope of his employment for the insurance company.

In rejecting or reversing the summary judgment on those claims as to Mr. Garrett, the CA in El Paso, Justice Larson writing the opinion, specifically looked at the sections under Art. 21.21 and simplistically concluded that because § 16 provides for a claim against any person engaged in prohibitive practices, and because §2 in its definition of persons makes reference to agents, concluded that because Mr. Garrett is a person, that he must be subject to liability for a §16.21.21 claim.

I should also draw the court's attention to the fact that in preparing for this oral argument, we ran across a 2nd CA opinion, which does simplistically and briefly address this issue as well, which is not referenced in the briefs of any of the parties to this case nor in the amicus briefs that have been filed. I do believe I should bring it to your attention. The Texarkana CA in an analysis lasting only 14 words in one sentence summarily also concluded simplistically that because the insurance company employee was a person, then he was subject to liability under the insurance code. It's the Southland Lloyds Ins. Co. v. Tomberlane, 919 S.W.2d 822.

PHILLIPS: **What's the writ history on that?**

LAWYER: **It is a writ denied. And we do not know whether that issue was presented to this court when the court denied writ on that opinion.**

We would submit that both CAs are incorrect with their simplistic analysis of the statute, and would argue that their decisions are inconsistent with this court's ruling in Alstate v. Watson, and inconsistent with the statutorily scheme set forth in art. 21.21.

Going back specifically to the Alstate v. Watson case, in that opinion this court rejected the argument that the term "any person" gives a stranger to the insurance contract a cause of action under the statute. Rather in that opinion, this court held that the obligations imposed by art. 21.21 are engrafted onto the contract between the insurer and the insured, and are extra contractual in nature. Given the fact that those obligations are purely extra contractual in nature, those obligations cannot be imposed on Mr. Bob Garret, who was not a party to the insurance contract in any form or fashion. Mr. Garrett is not an insurance company, he is not a business entity in any form or fashion. Rather, he is simply an individual acting on behalf of the insurance company, and was not a party to the insurance contract.

Secondly, we would argue that to impose individual liability on Mr. Garret would be inconsistent with the overall statutory scheme of art. 21.21. When you look specifically at §16, it refers to liability being posed on persons engaged in the unlawful acts or practices. When you look at §2 in order to determine the definition of "person," the CAs have ignored the fact that a crucial part of that definition if the term "engaged in the business of insurance." In other words, when it defines the term "person," it speaks about individuals or partnerships or companies that are "engaged in the business of insurance." Now that clause modifies the universe of people or entities that are persons under the statute. That phrase has meaning and it is a modifier of the types of individuals or entities that can be persons under the statutes.

This court recognized the significance of that phrase in that when analyzing who can be a defendant under an art. 21.21, §16 claim, this court specifically gave legal significance to that phrase when it held in The Great American Insurance Co. v. North

Austin MUD #1 case, that a surety company cannot be a defendant or liable under art. 21.21, §16, because a surety company is not engaged in the business of insurance. Similarly, the CA in Dallas in the McCain v. NME Hospital case, was confronted with a claim in which certain attorneys were alleged to have conspired with their insurance company clients to deprive a plaintiff of their insurance benefits and to misrepresent the nature of those insurance benefits.

ABBOTT: **Aren't adjusters frequently employees of insurance companies?**

LAWYER: **They are, but they are not always.**

ABBOTT: **But they can be, and in fact, frequently are?**

LAWYER: **Yes.**

ABBOTT: **And what about life insurance counselors, would they not be typically employees of insurance companies?**

LAWYER: **Now that, I am not sure. Life insurance counselors sometimes I think, I don't know whether financial planners would fall into that category, but certainly they are at times employees of insurance companies.**

ABBOTT: **Looking at §2, it says: Any other legal entity engaged in the business of insurance, including agents, brokers, adjusters...so are you saying that we are to read adjusters in the definition of "person" to be involved in the business of insurance such as they can be held independently liable only when they are acting not in the capacity of an employee for an insurance company, but in their capacity as an independent entrepreneur, sole proprietor or something like that?**

LAWYER: **That's correct. They have to be a party to a contract. If the insurance adjuster is an employee of an insurance company, they are not subject to personal or individual liability under the statute.**

ABBOTT: **You said something, I think new here, and that is you're saying that the standard should be whether or not the party is a party to a contract should be the test?**

LAWYER: **At the very least because of the Allstate v. Watson decision, which says that these obligations under art. 21.21 are extra contractual in nature and are engrafted into the contract itself. So there has to at least be a contractual relationship. That can sometimes occur meaning an agent can be an adjuster or broker whatever can be outside the insurance company in business as a sole proprietor. This court doesn't have to address that question here as to whether in its sole proprietorship that agent would be liable under the insurance code, it may well be. All that this court has to decided in this particular case is whether that**

agent, broker, or adjuster in this status as an employee of the insurance company has individual liability.

HECHT: **And in your view, no such employee could ever have that liability?**

LAWYER: **Under the insurance code. Yes.**

HECHT: **Although you think it's a field, if there were 3-4 principals say in an insurance agency, what would your analysis of that situation be?**

LAWYER: **If it's a sole proprietorship, if they are owners of the business, so that they are in essence the party with whom the individual or the claimant has a contractual relationship, then once again, I don't know that we have to answer that question today. But certainly what we're saying is at the very least that has to be that contractual relationship. If it was an Alexander and Alexander Insurance Agency, or an independent agency with principles and there was a contractual relationship, then this court might find art. 21.21 applies. But we don't have to answer that question today. What we simply have to say today is that an employee of the insurance company is not individually liable.**

Now I would remind the court that the term "engaged in the business of insurance," is a phrase that is prevalent within the statutory scheme of art. 21.21. When you look specifically at §1(a), which defines the purpose of art. 21.21 it speaks in terms of regulating the trade in the business of insurance. In §4, which is the part of art. 21.21, which defines the unfair methods of competition, it speaks in terms of the unfair methods of competition in the business of insurance.

ENOCH: **In the Watson case, the court was concerned about potential conflicting duties by the insurance company: a duty to the insured to treat the insured fairly, and a potential duty under the insurance code requiring an insurance company to have some sort of extra contractual duty to the third party, the injured person, creating a conflict between their duty to represent their insured, and be nice to the injured party. What would be inconsistent here with a duty against the employee to honor art. 21.21, that would be inconsistent with the employee's duty to its own business to comply with art. 21.21?**

LAWYER: **I am not prepared to articulate any of those inconsistencies. In fact, part of our argument, to skip forward just a minute, is that the addition of individual liability on behalf of Mr. Garrett in this particular circumstance, for example, is an unnecessary remedy and adds nothing to the claims that the Garrison Contractors group agreed has. It provides them no additional remedy nor no additional protections. Because as this court held in the Natividad decision, the buck stops with the insurance companies, because they have an obligation to regulate what their agents, servants, and employees do. This court held on page 700 of that opinion, that because the buck stops with the insurance company in rejecting the**

application of the common law duty of good faith and fair dealing to individual contractors and agents of the insurance companies, this court held there is no need to extend that duty to include agents or contractors of the insurance carriers because the insurance carriers are liable for the actions of their agents.

PHILLIPS: **Would that change if the carrier was insolvent?**

LAWYER: **It depends on the status of that insolvency. And, yes, I can understand that in an insolvency situation that might be the case. It certainly is not the case here with Liberty Mutual Ins. Co., which we have established in the record had close to $4 billion in policy holder surplus. This court has certainly indicated that that concern is not significant enough in this kind of situation when it held in that decision, that the insurance companies because of their ability to regulate their employees are sufficient enough to stand behind what their employees do and to regulate their conduct. And certainly the insurance companies have an obligation to regulate their employees and to make sure they comply with the unfair practices requirements of the insurance code. And that is a sufficient regulatory requirement upon the individual. But I don't see that kind of conflict that you're talking about, because indeed they will be...they have an incentive to control their employees and to make sure they comply with the statute.**

HECHT: **Under the common law, an employee or an agent may be liable for fraud done on the principal's behalf. Why isn't that an analogy for liability here?**

LAWYER: **What we're saying is that this court under this particular case is obligated to construe what the legislature meant when it enacted this particular statute. And, whereas, a common law cause of action might exist, given the phraseology of the statute which talks about being in the business of insurance, given this court's conclusion that the obligation here under art. 21.21 as set forth in Allstate v. Watson is one that's purely extra contractual in nature, and not a common law duty or obligation, then consistent with that, it should apply only to those entities that are tort parties to contracts.**

I would also point the court to §23 or art. 21.21, which further demonstrates the legislature's intent that individuals not be personally liable. Because in art. 23, the legislature addresses the question of how civil penalties, or judgements, or awards are to be funded. Those judgments that are obtained under art. 21.21, however they would be funded, and is simply out of the capital or surplus of offending insurance companies not individuals.

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RESPONDENT

LAWYER: **Let me first bring the court's attention to the handout that has been**

before the court during the course of the argument. I think it's very significant because as counsel agrees this is a statutory construction issue. There are analogs at common law. There are policy considerations that always can be taken into account. But as this court has recognized, when it's faced with a plain meaning of the statute, unless there is as Justice Enoch pointed out earlier, in a huge countervailing consideration about conflicting duties that make the statute unworkable in this context, then the plain meaning of the statute ought to be applied. Especially when it does fulfil the policy of making sure that the marketplace is rid of unfair and deceptive practices in the business of insurance.

OWEN: **Can we harmonize your position with §23?**

LAWYER: **Yes, I believe we can your honor. And I will tell you how that happened. This is one area of the law that I haven't had to research. I happen to have lived it because I was involved in each of the legislative sessions.**

When the Act was first passed (by the way the Act was back in 1957, but it did not get its private remedy of §16 until 1973, when it was passed as part of the package that also passed the DTPA at that time), §23 along with §16 as it was first enacted provided for only liability against companies. As a matter of fact, that's what I was about to bring to the court's attention is that in 1985, that language "may bring an action against the company or companies engaged in such practices" was taken out, and the word "person or persons" was put in, and the statutory definition of "persons" was completely reenacted without change. They did not go back and amend §23. So if you do have a judgment against a company, which obviously is among the persons that can be sued, then that will be only obtainable according to the calculation and limits of §23. And again, the fact that §23 speaks of reserves, which is only true of insurance companies cannot be squared with the broad definition of "person," which does cover agents and solicitors and individuals who don't have reserves.

OWEN: **How does that work? You say that if a judgment is rendered against the individual, that you can only satisfy that judgment...**

LAWYER: **No. What I said, if you have a judgment against, in this case Liberty Mutual Ins. Co., then obviously §23 by its terms will apply, because it does have reserves. The statutory formula can be applied and that particular judgment could only be obtained pursuant to those limitations or paid pursuant to those limitations. Section 23 doesn't apply to people who don't have reserves, and don't have the various aspects of that particular statutory formula. Obviously, it applies to individuals: individuals do not have reserves. It obviously applies to agents: agents do not have reserves. And so, the fact that §23 limits how one particular subclass of defendants may satisfy a judgment doesn't impact on the overall breath of the statute.**

GONZALEZ: **What would a suit against the individual liability accomplish in a suit**

with wrongful acts against a company not accomplish?

LAWYER: I guess it depends on the facts of each particular case. Let me first respond to you from a public policy standpoint.

GONZALEZ: The facts here, where we have a solvent insurance company?

LAWYER: Well in any individual case, whether you do or you do not sue the individual who actually made the representation to you, is a judgment made by the lawyer in the individual case. I do have Mr. _____ here, who was counsel below, and maybe that is a question best asked for him as to why he did it in this case. If you're asking why a statute exist that would permit a lawsuit to be filed against an individual...

GONZALEZ: If the individual is engaged in the business of insurance?

LAWYER: Absolutely. And there's no question that this gentleman was.

GONZALEZ: He was an employee of the company?

LAWYER: Absolutely. But he was engaged in the business of insurance. Section 21.02 lists the things that make a person an agent. An agent is anybody who, solicits an insurance policy, accepts a premium, delivers a policy. He did all those things.

GONZALEZ: What about the definition of entity? An entity is not a natural person.

LAWYER: That's an interesting point. The petitioners argue this case as though the word "legal entity" was the first word in the definition of person, and everything else followed thereafter. This statutorily definition begins with the word "any individual." And then it goes on to lists various kinds of insurance companies and then it has a catchall at the very end that says, "any other legal entity involved in the business of insurance."

Obviously, individuals are covered. I didn't hear counsel argue that an individual is not covered. He tries to draw a distinction between whether or not you're an employee or an independent agent, which I think it totally unworkable. Why should it make any difference whether or not a defendant is working for an insurance company, or on his own if he violates the law and causes damages? It certainly doesn't make any sense in the regulatory scheme if you're trying to rid the marketplace of wrongful practices.

And I'm also a little amused by this rather faithful statement in the petitioner's brief about how they are going to stand up behind their agents and the buck stops there. I happened to be the lawyer that was involved in the Celtic Life v. Coates, and I remember a long and drawn out trial and an appearance before this court where they were

contending that they were not responsible for the acts of their agent, because they did not specifically authorize him to make the misrepresentations that he made. And so, the responsibility of an insurance company for its employee or its outside agents is always hotly contested. And the buck does not stop there.

BAKER: Doesn't that assume either in or out of the scope of employment when you take that argument to where you want it to go?

LAWYER: If I understand the inquiry, the problem with trying to make a distinction between applying the statute to an individual agent when he is not working for an insurance company, and not apply it when he is an employee makes the consumer's ability to recover as well as the overall enforcement scheme of ridding the marketplace of unfair practice hinge on a finding of actual apparent express authority. It doesn't seem to be...

BAKER: My inquiry is, do you agree with the issue is this employee individually liable under the Act?

LAWYER: Absolutely.

BAKER: And he's an employee, and he was acting within the scope of his employment. Is there any dispute about that?

LAWYER: None that I know.

BAKER: So when they say in a case whether it's right or wrong, well we're not liable for his statement because it's "outside the scope of his employment" and try to prove that, doesn't necessarily mean that they don't stand behind it if they are found that it was...

LAWYER: What I was bemused by was the fact that we have a rather bland statement in the brief that no one has to worry about poor consumers, because we're going to stand up behind our agents, has to be taken for somewhat of a grain of salt. Because the authority of the agent to make the representation is hotly contested.

I want to bring up the Natividad v. Alexis case. That was a case involving unfair claims settlement practices. I believe Justice Gonzalez you authored that opinion, you found and it was obvious to all that were looking at it, that that particular tort rested upon a contract. And that there was no contract between the plaintiff and the defendant in that case. That is not the case here. Number 1, this is not an unfair claims settlement practices case. We are not talking about the failure of employee to carry-out contractual obligations. We're talking about an employee who made a misrepresentation by the scope of coverage, the very part of the DTPA, the very heart of article 21.21.

Here, if we need a contract, we have a contract. To be sure, not with the employee directly, but neither did fraud require an individual contract with the offending fraud feasor employee. So instead of Justice Enoch a situation where you have a long-standing practice, which we could debate the wisdom of about no direct actions against insurance companies in conflicting duties, there is no countervailing, huge policy consideration that would cause this court not to enforce the plain meaning of the statute.

HECHT: Is there anybody who is employed by an insurance company who would not be subject to liability under the statute?

LAWYER: I guess there's really always two points in a question like that. One is, is the definition of he who a suit may be brought against broad enough to pick up a lot of people? And the answer to that question is, yes, it's a broad definition. The second part of the question is, can they be held liable? And I think that's where the court properly exercises its control over this statute, and makes it a reasonable application as it looks at the individual laundry list sections that are involved, and decide whether or not in this particular case there was a making or circulating an advertisement that contains a false or misleading statement concerning insurance. Does the laundry list provision itself apply to this fact situation?

HECHT: If the suit were brought against a much lower level employee, but who had considerable responsibility for her boss's business, there might still be liability in those circumstances? I am trying to get a test.

LAWYER: I know that Justice Hecht. I think you're entirely right about asking the question. I can assure you, that question was asked in offices before I showed up here today.

HECHT: Mr. _____ says it's contractual and you say?

LAWYER: What I'm saying is that I am defending the centerfield today. I may be over here someday on the periphery, but not today. We have an agent who is expressly mentioned in the definition of person, who is selling insurance to somebody and making statements about coverage. I mean what could be so unquestionably within the definition of person? My opponent begged off on a similarly difficult question by saying, Well we don't have to reach that today. I think what the legislature did, and I think you can see the wisdom in this, why should we start carving down who is obligated not to lie, a priority by restricting the definition of person? And let's leave to application of the specific prohibitions in the statute to specific facts and determine whether or not this person violated this provision as opposed to a priority excluding them and allowing them to go and commit whatever act they want to, and hope that you drew the line appropriately. This is a broad application statute, not unlike the DTPA. As a matter of fact, another case and I'm going to supply you a list, Light v. Wilson, 663 813, 1983, there it was the sole shareholder of a corporation personally responsible. Justice Spears in his concurrence says that in referring to an earlier opinion of this court, Kelly v. McClaren said that in that case which had held no liability, that there was

no showing that that person had actually committed a deceptive trade practice himself, and said in this case that it was.

HECHT: **The arguments are the only reason this is done is for harassment and to avoid removal on the other side. But you say it is also to root out bad practices?**

LAWYER: **Absolutely.**

HECHT: **Then are there any other considerations: discovery or any other tactical or nontactical?**

LAWYER: **This statute as well as the DTPA, and of course as a general provision in the rules about it, but I believe the DTPA was the forerunner, the first one to ever mention sanctions for bad faith harassment claims. And providing that in the statute provision, I think later was the model for the court. So you have that protection.**

Another thing that strikes me, too, and that is that whether or not an individual person is brought into a case or not, there may be tactical considerations. We all know there's another area of the practice of law. But whether or not the federal courts are properly getting enough diversity cases can be the subject of congressional action or the modification of their fraudulent joinder rules.

Let me mention a parallel statute. I think it's useful sometimes to say, Well if the legislature intended a narrow class of defendants to be sued, why didn't they say so, and have they said so any place else? Well in the prompt payment of claims statute, 21.55 of the Insurance Code, provides squarely that the action is brought only against the insurer. Express limitation of a cause of action on behalf of insureds and policyholders you must respond with the reasons you're denying the claim. It sets forth other standards that apply in the handling of a claim. The duty is owed only by the insurer...

ABBOTT: **But no one else can make a prompt payment?**

LAWYER: **Absolutely. But other people could be involved in the nonpayment of it. There is always the notion that corporations act only through their employees, and like in Natividad there may be somebody to whom that responsibility has been given that is doing the four-corner passing game and keeping the claim from being paid. But the point of the story is, that if there was a remedy provided for unfair claims settlement practice of a specific sort, and it was a remedy limited to an insurance company, my point for brining it up only is that when the legislature wants to narrow the class of persons against whom a suit can be brought, it has shown itself entirely capable of doing so. And on the other side, this new unfair claims settlement practice list I think partially in a response to the Watson case of Justice Enoch, the unfair claims settlement practices that were only over in 21.21-2 were brought over and**

enacted in 21.21 to remove the notion that you had to reach out and incorporate those. 21.21-2's prohibitions now in 21.21 are only available if the claimant is an insured or beneficiary.

Again, if there is a desire on behalf of the legislature to narrow the scope either of the plaintiff or of the defendant, the person to whom the duty is owed or the person who owes the duty, they have shown themselves entirely capable of doing so. And I noticed some of those federal cases that the petitioners cited, cited to cases holding as Justice Hecht said earlier, that an agent can be liable for his own misrepresentations. And one of those cases was the Gross case, another case not cited. And I will supply them.

HECHT: There was a fraud claim that the TC ruled against the plaintiff on, does it survive on appeal here? Is there contention by the respondent that there is still some error in the fraud ruling?

LAWYER: I don't believer there was a cross application for writ of error on the fraud point. So the fraud point is not before the court.

HECHT: And secondly, there's an argument that if there is a remand it would go as to all the claims. But how does our Bandera decision some months ago impact this case?

LAWYER: I haven't read it, and I don't know. But you know what, I am going to send you a letter when I get back to the office.

GONZALEZ: I was not completely clear in your response to Justice Owen's question to how you can harmonize §23 with 16, because I could follow your argument and then we butt head-on with 23, that says these penalties should be paid on the capital or surplus funds on the offending insurance company. I'm still having difficulty reconciling that.

LAWYER: I am trying to give you what really happened with this statute. It helps to at least put it in context. At one time, the case could only be brought against a company or companies. That was changed in 1985. Twenty-three was unchanged. How do you harmonize them? Do you take 23, which says that if a suit is against the insurance company it can only be taken out of their reserves and...

GONZALEZ: Shall be paid only from the capital or surplus funds of offending insurance company.

LAWYER: Absolutely. You ask me how I reconcile it. If you have a judgment against an offending insurance company, 23 applies, and can be taken out pursuant to that statutorily limitation. The only other way to do it is say, 23 says it's going to be taken out of reserves, that must mean that the legislature really didn't know what they were doing when they enacted the definition of person, they really didn't know what they were doing when they

reenacted the definition of person, and they really didn't know what they were doing when they took out company or companies out of §16.

GONZALEZ: **All those things are possibly true.**

LAWYER: **That's listed under the accepted rules of statutory construction, but they may not be the real rules of statutory construction.**

PHILLIPS: **There are two federal cases and one state case that have looked at this precise point before?**

LAWYER: **Yeah. But there was one case that they didn't cite.**

PHILLIPS: **You just mentioned the federal cases. I thought you mentioned the name and I don't see it in the brief.**

LAWYERS: **There's one they did not cite, which is Haynes v. National Union Fire, 812 Fed. Sup. 93, which says under Texas law an agent may be liable for misrepresentations to insured after certain deceptive trade practices. That Southern District of Texas judge cited Gross v. State Farm, 818, 908, "thus when State Farm's agent misrepresented coverage, that misrepresentation made her individually liable and that statement was also a misrepresentation by State Farm that make it liable as well," citing Royal Globe. That's at page 912. But I will do a list and get that over as soon as possible.**

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REBUTTAL

LAWYER: **I feel somewhat at a disadvantage because I've heard a lot of cases thrown around that were not in respondent's brief. But if I can try to address those that I recognize, I will do so quickly. Light v. Wilson case, that was cited, is a DTPA case, which Justice Spears in a concurring opinion argued that the court should make it clear that individuals can be liable under the DTPA case, and therefore, arguing for an overruling of this court's opinion in the Carl and Kelly case.**

To my knowledge, the Carl and Kelly case has never been overruled. But the point is, that all that line of cases has to do is whether or not an individual employee can be liable under the DTPA, which this court under Carl and Kelly is saying no. But we don't deny that individual agents can be liable under common law for fraud or intentional misrepresentations, etc.

What we are arguing however, is that art. 21.21, §16 does not provide such a cause of action against the employee in his individual capacity. And we go back to the

language that defines person and modifies it to be only those individuals or entities that are engaged in the business of insurance.

SPECTOR: **What business is he engaged in? I don't understand your making a point of that phrase removing the agent from...**

LAWYER: **It's our position that Mr. Garrett is not personally engaged in the business of insurance.**

SPECTOR: **What business is he engaged in?**

LAWYER: **He's in the business of his employer. In other words, when you go to deal with Mr. Garrett, when an individual comes in to buy something and deal with Mr. Garrett, they are really dealing with Liberty Mutual Ins. Co. acting through Mr. Garrett. They purchase a policy that's issued by Liberty Mutual Ins. Co. They do not purchase anything that is sold by Mr. Garrett. So he is engaged in Liberty Mutual's business of insurance, but he is not individually engaged in the business of insurance.**

ENOCH: **Following your reasoning, you put a gloss of sort of a contractual arrangement between the parties. Since Garrett is only contracted on behalf of his employer, that's the only place the contract goes, but the definition includes adjusters. Ordinarily adjusters would not have even if they were independent of the insurance company, they would not have some sort of contractual arrangement with...their contract might be with the insurance company, but it wouldn't necessarily be with the insured.**

LAWYER: **That is sometimes correct, but sometimes incorrect. Insureds will sometimes have significant self-insured retentions, and they will hire adjusting agencies or adjusters to help them adjust their claims under their self-insurance program or under their self-insurance retention, or they will hire third party administrators. You can still give legal meaning to and effect to the word adjusters consistent with the position that we're taking in this particular case. Although you are correct, sometimes adjusters are employees of the insurance company, and there isn't that direct contractual relationship.**

Certainly, when you talk about agents and brokers, often insureds will go to independent agents who were their agents in helping them buy insurance policies, and they have a contractual relationship with the independent agency that's helping them obtain insurance. There you have a contractual relationship. Again, that's not involved in this particular case. We have a neat set of facts here where the defendant is an employee of an insurance company.

OWEN: **What if you're a life insurance counsel, but you're an individual. How do you square that with §23?**

LAWYER: **If you are a life insurance counselor, but your in business on your own because you're a self propriety, then one can still be consistent with this contractual requirement and impose the contractual requirement and say that there could be a suit against that individual is a separate business entity as a sole propriety as a life insurance counselor. Or if he's an employee of an independent group of life insurance counselors, then you could have a contractual relationship with that group that he is an employee of that's a life insurance counselor group. What we are saying is that you have to have that contractual relationship.**

OWEN: **But if you're a life insurance counselor and you're a sole propriety, you don't really have capital of an insurance company within the meaning of §23, do you?**

LAWYER: **That's correct. And that's why it's not necessary for this court to make a decision about that, because I recognize the troubling relationship between that and §23. But clearly those provisions can be consistently construed here where the defendant is an employee of an insurance company.**

OWEN: **If you get a judgment against a life insurance counselor who is a sole propriety, how do you enforce that in light of §23?**

LAWYER: **I don't honestly know. I mean if this court is to permit a suit under art. 21.21 against a life insurance counselor who is a sole propriety and a sole individual, I don't know how he satisfies the judgment under §23, if you limit it to the capital surplus of an insurance company. Because obviously he doesn't have that. That's why certainly §23 is difficult to reconcile, but it has remained on the books since 1985, even after the legislative changes pointed out by Mr. _____.**