

IN THE SUPREME COURT OF TEXAS

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No. 96-0249
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PROVIDENT AMERICAN INSURANCE COMPANY, PETITIONER

v.

DENISE CASTAÑEDA, RESPONDENT

=====
ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS
=====

Argued on January 8, 1998

JUSTICE ENOCH, concurring.

I join the Court's judgment. Because I do not agree with the Court's analysis in part V, I write separately.

I agree with the Court that misrepresenting coverage might be a basis for imposing liability under the DTPA and the Insurance Code in another case.¹ But both the Court and the dissent incorrectly presume that preapproval constitutes, per se, an independent "representation." To the contrary, preapproval cannot have any legal significance apart from the underlying contract.

Preapproval, generally, is nothing more than an iteration of the coverage already contracted for. What Castañeda really questions is whether Provident's preapproval estops it from relying on the contract's other terms. That is, did Provident, by preapproving surgery, waive its rights to rely on the explicit terms of the insuring agreement? I think not.

¹ See ___ S.W.2d at ___.

Let me give an example. Suppose Smith and Jones enter a contract on June 1 by which Smith agrees to buy Jones's car on July 1, but only if Jones owned the car on June 1. Then, on June 15, Jones calls Smith and asks, "You're still going to buy my car, aren't you?" To which Smith replies, "Yes, I'm buying your car." July 1 comes and Jones tenders a car, but the car was not owned by Jones on June 1. Therefore, Smith refuses to pay.

Does Jones have a fraud/misrepresentation claim based on Smith's June 15 oral statement that he would buy the car? Surely not. One could hardly argue that Smith's statement deprives him of the right to assert the conditions of the contract at the risk of being sued for a misrepresentation. If Jones has a cause of action, it is at best for breach of contract.

Insurance policies are contracts subject to interpretation under general contract principles.² Provident's "representation" to Castañeda about the contract (*i.e.*, preapproval) does not preclude it, at the risk of being sued for misrepresentation, from relying on the contract.

* * * * *

Provident's preapproval was not an independent "representation" under the Insurance Code. Consequently, the Court errs in presupposing that it was. With these remarks, I join all but part V of the Court's opinion, and I join the Court's judgment.

Craig T. Enoch
Justice

Opinion delivered: December 31, 1998

² See, e.g., *Balandran v. Safeco Ins. Co.*, 972 S.W.2d 738, 740-41 (Tex. 1998); *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995).