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***Insurance: When Can Insurance Policy Benefits Be Recovered As Damages for Statutory or Common Law Bad Faith?***

***Interest of Justice Remand: Remand Instead of Rendition Is Appropriate When Each Party Relies on Confusion Created by Seemingly Conflicting Decisions.***

***Error Preservation: Post-Judgment Motion for JNOV Based on No Evidence Supporting the Substantively Correct Standard Bypasses Any Error in the Charge Submission of That Standard.***

Until now, the supreme court's opinions seemed to conflict on whether and when policy benefits could be recovered as damages when an insurer engages in conduct that violates the statutory or common law standards for good faith and fair dealing with its insured. In 1988, the court declared in *Vail v. Texas Farm Bureau Mutual Insurance Co.*, that an insurer's "unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." 754 S.W.2d 129, 136 (Tex. 1988). Ten years later, in *Provident American Insurance Co. v. Castañeda*, it ruled that an insurer's "failure to properly investigate a claim is not a basis for obtaining policy benefits." 988 S.W.2d 189, 198 (Tex. 1998). Many, including the Fifth Circuit, saw these statements as conflicting as to whether, as stated in *Vail*, policy benefits could be recovered as damages acts committed by the insurer in bad faith. *In re Deepwater Horizon*, 807 F.3d 689, 698 (5th Cir. 2015).

In an 8-0 decision<sup>2</sup> by Justice Boyd, the supreme court in [USAA Texas Lloyds Co. v. Menchaca](#) clarified the apparent confusion in the court's refreshing and continuing trend to reign in out-of-context reliance on isolated statements leading to results at odds with underlying legal principles. See, e.g., [Kramer v. Kastleman](#) (clarifying the limits of estoppel based on accepting the benefits of a judgment). At the risk of oversimplification, the rule announce in *Menchaca* is that policy benefits, if lost or denied as the result of the conduct of the insurer in violation of the statute or common law "bad faith" prohibitions may recover those benefits as damages for the tortious bad faith conduct. However, if there were no policy benefits regardless of the insurer's bad faith conduct, then the bad faith conduct does not in and of itself create recoverable contractual benefits that did not otherwise exist.

The more complete statement of when policy benefits or other damages are recoverable was summarized by the following statement of "rules." Rules 1- 3 deal with when policy benefits are recoverable as statutory bad faith damages. Rules 4 and 5 deal with damages recoverable for statutory bad faith when the policy did not obligate the insurer to provide any contractual benefits under the policy.

Rule 1. Generally, "an insured cannot recover policy benefits as damages for an insurer's statutory [or common-law bad faith] violation if the policy does not provide the insured a right to receive those benefits." An example of this situation is presented when the insurer correctly determines that the insured is not entitled to benefits under the policy but reaches that conclusion for an erroneous reason. However, this rule does not, as some incorrectly inferred, mean that there can be no damages whatsoever for bad faith unless there were benefits under the policy. Thus, when there is a claim for failure to reasonably investigate, there can be no recovery when there was no coverage under the

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<sup>1</sup> The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

<sup>2</sup> Justice Johnson did not participate in this case.

policy in the first place. On the other hand, if the insurer's statutory violation causes the insured to lose policy benefits, the insured is not obliged to also prove that the insurer *also* breached the policy.

Rule 2. An insured who establishes a right to [insurance policy benefits] ... can recover those benefits as actual damages [for] the Insurance Code if the insurer's statutory violation causes the loss of the benefits. It was on this basis that the court distinguished its pronouncement in *Vail* in which the insured was entitled to policy benefits, from *Castenada*, in which the insured was not otherwise entitled to recover under the policy.

Rule 3. Even if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages under the Insurance Code if the insurer's statutory violation caused the insured to lose that contractual right. This rule is but a context-specific application of the broader principle that a party is entitled to recover in quasi-contract when it reasonably relies on a misrepresentation about the scope of coverage or misleads the insured about its willingness to cover the claim and uses that deception or other statutory violation to later avoid its contractual obligation.

Rule 4. If an insurer's statutory violation causes an injury *independent* of the loss of policy benefits, the insured may recover damages for *that injury* even if the policy does not grant the insured a right to benefits. However, an injury is not independent if it depends on the recovery of policy benefits. If the injury is not "independent," the insured's recovery is limited to policy benefits, if any.

Rule 5. An insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits. This rule is simply an inescapable consequence of Rules 1 – 4.

In *Menchaca*, the jury failed to find the insurer breached the insurance policy, but it found that the insurer did not reasonably investigate the insured's claim in violation of the Insurance Code and that the failure resulted in the loss of benefits that should have been paid under the policy. However, the amount of the claim was less than the deductible and the court deemed that fact some evidence to support the jury's refusal to find that the insurer breached its contract because there was no amount that it should have but failed to pay under the policy. The supreme court disapproved the lower courts' disregarding the jury's answer. It was neither immaterial nor unsupported by any evidence. Unless it is one or the other, a jury's answer cannot be disregarded even if cannot be determined why the jury answered as it did.

Ordinarily, when the jury's verdict cannot be disregarded, the court is obliged to render judgment in accordance with that verdict. However, in this case, the supreme court decided that the confusion created by its precedents misled the insurer into arguing that the insured could not recover because she sought no damages separate from policy benefits. It determined that the insured was likewise adversely affected because she argued that she could recover on the basis of the jury finding that the insurer would have paid \$11,350 but for unreasonably investigating the claim even though she was not entitled to benefits under the policy. Consequently, the court determined that justice required a remand so that the case could be tried according to the proper legal standard established in its opinion in this case.

By footnote, the court also opined on the confused and confusing topic of what is necessary to preserve charge error. At bottom, the issues in *Menchaca* arose because the jury's answer concerning the statutory violation was not conditioned on an affirmative answer to the breach of contract question and the jury's damages answer allowed the combination of contractual and statutory damages. The insurer's only objections to the charge were *Casteel* derivatives: the damages question made it impossible to segregate contractual from extra-contractual damages and extra-contractual damages must be independent of the contractual recovery. The court held that these objections were sufficient to inform the trial court of the basis of the arguments ultimately presented to attack the jury verdict. The opinion, however, does not solely rest on the sufficiency of the charge objection. It further notes that "a purely legal issue which does not affect the jury's role as fact-finder" may preserve error when "raised for the first time post-verdict." Though the opinion does not cite it, this is but an implementation of the rule in *Osterberg v. Peca* that when the post-judgment motion to disregard is based on an argument that the issue should have never been submitted to begin with, then the objection can be preserved by a post-verdict JNOV motion.

***Tort Claims Act Immunity: Laverie v. Wetherbe Revised***

The supreme court took the fairly unusual step of issuing a new opinion on the denial of rehearing in [Laverie v. Wetherbe](#). Its original December 9, 2016 opinion held that it was unnecessary to prove subjective intent to only act in the capacity as a government employee for the actor to be entitled to immunity under [§101.106\(f\) of the Texas Tort Claims Act](#). The substituted opinion reaffirms that a state employee is immune under the Tort Claims Act for statements made in an official capacity as a state employee. However, the substituted opinion, instead of rendering a judgment dismissing the suit, dismisses only the “claims arising out of the statements at issue in this appeal” while remanding “any remaining claims to the trial court for further proceedings consistent with this opinion.”

A redline of the original opinion and the opinion on rehearing is available on request.

***Eminent Domain Authority: Opinion in Denbury Green Modified***

The court also released a [corrected version](#) of Justice Green’s January 6 opinion in Denbury Green Pipeline-Texas LLC v. Texas Rice Land Partners. The opinion was revised to refer to the subsidiary, Denbury Onshore, instead of the parent entity, Denbury Green. The substance of the court’s holding and analysis remain unchanged.