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SUPREME COURT OF TEXAS
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No. 14-0721

In the Supreme Court of Texas

USAA TEXAS LLOYDS COMPANY,

Petitioner,

v.

GAIL MENCHACA,

Respondent.

On Petition for Review from the
Thirteenth Court of Appeals at Corpus Christi/Edinburg, Texas
Cause No. 13-13-00046-CV

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE CASE

Nature of the case:	Following Hurricane Ike, Gail Menchaca made a claim with her homeowners' insurance company, USAA. USAA determined that Menchaca's claim was covered under the policy but that her damages did not exceed her deductible. DX3; RR4:26. Menchaca sued USAA for breach of contract and for failing to comply with the Texas Insurance Code. The jury found that USAA conducted an unreasonable investigation and that USAA's unreasonable investigation caused USAA to fail to pay $11,350.00 it should have paid for Menchaca's Hurricane Ike damages.
Trial Court:	Hon. Fred Edwards 9th Judicial District Court, Montgomery County, Texas
Trial Court's Disposition:	The trial court rendered judgment in favor of Gail Menchaca and against USAA in accordance with the jury's favorable findings on her Insurance Code claim.
Court of Appeals:	Thirteenth Court of Appeals; opinion by Justice Garza, joined by Justices Rodriguez and Benavides. *USAA Texas Lloyd's Co. v. Menchaca*, No. 13-13-00046-CV, 2014 WL 3804602 (Tex. App.—Corpus Christi July 31, 2014, pet. filed) (mem. op.).
Court of Appeals' Disposition:	The court of appeals deleted the jury's award for penalties under the Insurance Code but otherwise affirmed the trial court's judgment.
Parties on Appeal:	Petitioner/Appellant/Cross-Appellee/Defendant is USAA Texas Lloyds Company. Respondent/Appellee/Cross-Appellant/Plaintiff is Gail Menchaca.

STATEMENT OF JURISDICTION

This Court does not have jurisdiction under Government Code section 22.001(a)(2). There is no conflict between the court of appeals's opinion and prior decisions of other courts of appeals or of this Court. Specifically, this case does not conflict with *Provident American Insurance Co. v. Castañeda*, 988 S.W.2d 189 (Tex. 1998). USAA's arguments confuse the concepts of coverage and breach and ignore the Court's more recent writings in cases such as *State Farm Lloyds v. Page*, 315 S.W.3d 525 (Tex. 2010) and *JAW the Pointe, L.L.C. v. Lexington Insurance Co.*, 460 S.W.3d 597 (Tex. 2015).

With regard to Government Code section 22.001(a)(3) and statutory construction, Ms. Menchaca obtained the findings necessary to support her recovery under Chapter 541 of the Insurance Code, and these findings are amply supported in the evidence. Further review by this Court is unnecessary.

The Court also does not have jurisdiction under Government Code section 22.001(a)(6). In affirming Ms. Menchaca's recovery on her Insurance Code claim, the court of appeals did not commit an error of law of such importance to the jurisprudence of the State that it requires correction.

ISSUES PRESENTED

1. Whether the jury's findings—that USAA violated the Insurance Code and committed a deceptive act by failing to conduct a reasonable investigation of Menchaca's admittedly covered Hurricane Ike claim; that USAA's deceptive act caused USAA not to pay for all of Menchaca's Hurricane Ike damages; and that USAA failed to pay Gail Menchaca $11,350.00 it should have paid for her covered Hurricane Ike damages—are sufficient to support the judgment in favor of Gail Menchaca?

2. Whether the jury's failure to find that USAA breached the insurance policy eviscerates the jury's independent affirmative findings that USAA's deceptive act of failing to conduct a reasonable investigation of Menchaca's admittedly covered Hurricane Ike claim caused USAA not to pay $11,350.00 in policy benefits that it should have paid for Menchaca's covered Hurricane Ike damages?

3. Whether the trial court correctly disregarded the jury's failure to find that USAA breached the insurance contract and rendered judgment on the jury's affirmative findings that USAA violated the Insurance Code and caused Menchaca actual damages?

4. Alternatively, whether Menchaca is entitled to remand for a new trial in the event the judgment of the court of appeals is not affirmed by this Court?

REASONS NOT TO GRANT REVIEW

This is not a case the Court should take, unless it desires to affirm the court of appeals and reaffirm an insured's rights under the Insurance Code.

Jury findings supported by the evidence. USAA does not deny, and does not challenge, the jury's finding that it violated the Insurance Code and committed an unfair or deceptive act in refusing to pay Gail Menchaca's covered Hurricane Ike claim without conducting a reasonable investigation of that claim. CR666. In light of that unchallenged jury finding, Menchaca is entitled to recover the "actual damages" that were "caused by" USAA's deceptive act. TEX. INS. CODE §§ 541.151, 541.152. Those actual damages can include policy benefits wrongfully withheld, as the Court has repeatedly recognized. *E.g.*, *Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184-85 (Tex. 1998); *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995); *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988).

There is ample evidence that the actual damages caused by USAA's deceptive act were unpaid policy benefits that USAA should and would have paid if USAA had performed a reasonable investigation of Menchaca's claim. USAA entirely ignores the evidence supporting the jury's findings, but the Court should not. The jury understandably found that, had USAA conducted a reasonable investigation of Menchaca's admittedly covered Hurricane Ike claim, USAA would have found and paid $11,350.00 for covered Hurricane Ike damages. CR667.

There is no statutory, policy, or evidentiary reason that Menchaca should not be able to recover unpaid policy benefits when those are the "actual damages" Menchaca proved—and the jury found—were "caused by" USAA's unreasonable investigation of Menchaca's covered Hurricane Ike claim.

No conflict with precedent. Unlike the cases discussed and relied upon by USAA, this is not a case in which the insurer has "denied a claim that is in fact not covered." *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995); *accord Provident Am. Ins. Co. v. Castañeda*, 988 S.W.2d 189, 192 (Tex. 1998) ("The Castañedas submitted claims to Provident American, which were denied."). To the contrary, USAA conceded below that: (1) USAA never denied Menchaca's Hurricane Ike claim, or any part of her claim, (2) Gail Menchaca suffered a covered loss, and (3) "[i]f [USAA] would have found damage, we would have paid for it." RR3:59, 69-70, 81; 4:26, 32; 7:34-35; 9:35-36, 60; 10:90; DX3.

Neither *Stoker* nor *Castañeda* involved an insurance company's failure to reasonably investigate an admittedly covered claim. To the contrary, in *Stoker*, this Court specifically distinguished a case like this one where the insurer "did not deny coverage" but disputed the amount owed (as USAA did here). *Stoker*, 903 S.W.2d at 341 n.1 (citing *Deese v. State Farm Mut. Auto. Ins. Co.*, 838 P.2d 1265 (Ariz. 1992)). This case involving a failure to reasonably investigate an admittedly covered claim does not conflict with *Stoker* or *Castañeda*.

USAA conflates questions of coverage and breach, but this Court has made clear that it is the absence of coverage—not the absence of a breach of contract finding—that precludes extra-contractual claims. As the Court explained in *State Farm Lloyds v. Page*: "When the issue of *coverage* is resolved in the insurer's favor, extra-contractual claims do not survive. . . . There can be no liability under either Article 21.55 or Article 21.21 of the Insurance Code, if there is no *coverage* under the policy." 315 S.W.3d 525, 532 (Tex. 2010) (footnote and citation omitted) (emphasis added). Equally, however, the Court confirmed that "*to the extent the policy affords coverage, extra-contractual claims remain viable.*" *Id.* (emphasis added).

This case is controlled by *Page* and the many consistent decisions of this Court. When an insured's claim is *not covered* under the policy, the insurer's bad acts cannot cause the insured's loss of policy benefits as a matter of law. But when an insured's claim *is covered* under the policy, the insurer's failure to reasonably investigate that claim most assuredly can cause the insurer to overlook damage and fail to pay policy benefits owed to the insured. As the jury found and the evidence supports, this is such a case.

Settled statutory construction. USAA would rewrite Section 541.151 of the Texas Insurance Code by authorizing a private cause of action for "actual damages . . . caused by the [insurer] engaging in an [unfair or deceptive] act or practice," only if the claimant also shows that engaging in the act or practice was in breach of the insurance policy. The Legislature could have imposed such a requirement, but

it did not; and the Court should not override the Legislature's choice. *See Ritchie v. Rupe*, 443 S.W.3d 856, 880 (Tex. 2014) ("[W]hen the Legislature has enacted a comprehensive statutory scheme, we will refrain from imposing additional claims or procedures that may upset the Legislature's careful balance of policies and interests").

In cases like this one, where the insurer's failure to conduct a reasonable investigation of an admittedly covered claim has caused actual damages in the form of unpaid policy benefits, the Legislature has determined that those actual damages are recoverable. The Court should enforce the statutory cause of action as it is written. Otherwise, Section 541.151 would become a toothless, useless remedy, and insurers could shirk their statutory duties by, as here, just omitting them from the insurance policy. Such an interpretation is not reasonable. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) ("The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.").

Jury charge waiver. The jury charge submitted the breach-of-contract claim in Question 1 and the Insurance Code claim in Question 2. CR665-66. USAA did not object to a failure to predicate the Insurance Code question on an affirmative answer to the contract question. RR10:36. USAA did not request an instruction directing the jury not to answer Question 2 if it answered "no" to Question 1. *Id.* And USAA did not object to Question 2 on the ground that it imposed liability

without a finding that USAA had failed to comply with the insurance policy. *Id*. Moreover, USAA did not object to the damages question on the ground that it allowed Menchaca to recover policy benefits without obtaining "yes" answers to both the breach of contract and Insurance Code questions. RR10:36-37.

USAA has waived its right to argue that a breach finding is a prerequisite to recovery of policy benefits under the Insurance Code. *See In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003) (because party did not object to jury charge, he waived complaint on appeal). Holding otherwise—that is, holding that a claimant has an *unwaivable* burden to secure a breach-of-contract finding in order to recover under the Insurance Code—would undo the well-established rules of jury charge preservation.

Simply put, the issues presented in this case do not warrant the Court's attention, and the Court should deny review. *See* TEX. R. APP. P. 56.1(a).

STATEMENT OF FACTS

USAA's new lawyers do not like the story that USAA told the jury during trial. But it is too late for USAA to invent a new story. USAA—and the Court—must live with the record that exists, not with the record USAA tries to imagine.

Gail Menchaca suffered a covered loss during Hurricane Ike—a fact her insurer, USAA, readily conceded below. RR4:26. USAA repeatedly and consistently told the jury that it did not deny any part of Menchaca's claim. RR3:59, 69-70, 81; 4:26, 32; 7:34-35; 9:35-36; DX3. USAA's "decision was that

it was a covered loss, but that cost to repair the damages did not exceed her deductible." RR4:26 (emphasis added). USAA never wavered from that position. RR3:59, 81; 4:32; 7:34-35; 9:35-36, 10:90. USAA was adamant that "[i]f we would have found damage, we would have paid for it." RR9:60.

The jury agreed that Ms. Menchaca had suffered a covered loss and that had USAA found damage, it would have paid for it. But the jury also determined that USAA did not find Hurricane Ike damage because USAA did not conduct a reasonable investigation of Menchaca's claim. CR666, *see also* RR9:60 (USAA agreed that "[j]ust because you didn't find something, doesn't mean you looked for it."). As a result, the jury found that USAA's unreasonable investigation of Menchaca's covered Hurricane Ike claim caused USAA not to pay—and Menchaca not to receive—$11,350.00 in policy benefits USAA should have paid for Menchaca's Hurricane Ike damage. CR667.

Hurricane Ike strikes and Menchaca reports her claim. Gail Menchaca is a registered nurse who has worked at the Veterans Hospital in Houston for 22 years. RR6:5. At the time of Hurricane Ike, Ms. Menchaca lived alone in her house, but she did not evacuate. RR7:4-5. As the storm winds got heavy, Menchaca went to a hallway in the center of her house with a pillow and blanket and stayed there through the night. RR7:6. Overnight, Menchaca could hear

things banging on the roof and hitting the windows. *Id*. In the morning, there was debris all over the place, and Menchaca had no electricity. RR7:7.

Ms. Menchaca's home was without power for a month after Hurricane Ike struck. RR6:8. Ms. Menchaca moved into a hotel close to the Hospital, spending nights there and working during the day. RR6:7.

Early one morning after she returned home, as she was backing out of her driveway, Menchaca saw the shingles on the right side of her roof billowing, and lifting up and down. RR6:10. Concerned about her roof, Menchaca called USAA in October 2008 (six weeks after the storm), told them what she had seen, and asked that they send a USAA employee to assess her damage. *Id*. Ms. Menchaca also told USAA that everything in her refrigerator and freezer had been lost, that the electrical panel on the side of the house had been pulled away from the wall, that the sprinkler system was not working, and that her fence had been damaged. RR6:10-11.

USAA's claims file documents that Menchaca called on October 28, 2008. RR12:182. According to USAA's records, Menchaca reported:

> there is some damage to [sic] shingles are missing or damaged;
>
> air conditioner is working but would like looked at;
>
> commode has low water level;
>
> power line has yanked line away from house.

Id. USAA's records also reflect Menchaca's request that a USAA adjuster handle her claim. *Id*.

USAA's first inspection and confirmation of coverage. Contrary to Menchaca's request that her claim be handled by a USAA adjuster, USAA assigned Menchaca's claim to an outside adjuster, Darby Hambrick. RR4:51-52; 6:13-14, 16; 10:9-10; 12:182-83. In an attempt to excuse Hambrick's shoddy inspection, USAA has figured out that his inspection occurred "on Sunday." USAA Br. at 3. Perhaps he should have come another day of the week (if that matters so much to USAA), because the jury rightly was unimpressed with his Sunday performance.

According to Hambrick himself, Hambrick's entire inspection of Menchaca's property lasted just 45 minutes. RR4:59. In that 45 minutes, in addition to many other things, Hambrick claimed to have "inspected the whole roof, yes sir." RR4:61. Hambrick could not remember the exact words Menchaca used to describe the damage to her roof, but he knew Menchaca was concerned about the right slope of the roof by the garage. RR4:59-60. Ms. Menchaca was on the ground, pointing out the area where she thought there might be damage. *Id*. Hambrick claimed that he inspected Menchaca's "area of concern" in detail and spot checked all slopes of the roof, looking for wind damage to the shingles and determining if any of the seals on the shingles were loose. RR4:59, 61; 10:19-20.

According to Hambrick, he checked some 15 to 20 shingles on "[a]ll slopes, all directions," including the breezeway and the garage roof. RR4:62. He "of course" tried to find evidence of unsealed shingles. RR10:19.

Despite what he claimed to have been his extensive inspection of the roof, Hambrick found only two (or three) damaged shingles on the entire roof, on the front gable. RR4:59-60; 10:19. Hambrick swore that he did not "find any shingles where the seals were broken." RR4:62. He "noted no loose shingles." RR10:20.

In his 45 minute property inspection, Hambrick also inspected Menchaca's electrical panel and determined that the damage to the panel was a covered loss. RR3:59; 10:29-30. Although concluding the damage was covered, USAA allowed only a minimal charge to have the electrical panel reattached to the exterior wall of the house. DX4. USAA admitted that neither Hambrick nor any other adjuster who inspected Menchaca's house was an electrical engineer or electrician qualified to determine whether that minimal repair was sufficient. RR3:88-89. According to USAA, "the estimate allowing for the minimum charge was to suggest to have an electrician take a look at that and determine what had to be done." RR3:89-90. But USAA never advised Menchaca that she should have the panel inspected by an electrician, and USAA never followed up and had an electrician inspect the panel. RR3:89-91.

Hambrick also said that he walked through the interior of Menchaca's home during his 45 minute inspection. RR4:59; 10:23. While he did not recall going into every room, he inspected at least the living room, kitchen area, the main hallway, and perhaps the master bedroom. RR10:23-24. He "[o]f course" looked for evidence of damage, but he claimed to have found none. *Id*.

Hambrick also swore that he inspected Menchaca's fence during his 45 minutes on the property. RR4:59; 10:21. According to Hambrick, he saw "one post laying this way and one post laying this way," but he claimed to have concluded that was just "normal wear and tear" for a fence that was 8-to-10 years old. RR10:21-22.

Hambrick said that he did not recall having a conversation with Menchaca about her food loss. RR10:25. At the same time, he said that asking someone if she had food spoilage following a hurricane was "a standard one-on-one question." *Id*. Asked about Menchaca's testimony that Hambrick had said her food loss was below her deductible, Hambrick did not deny making the statement, nor did he say that he never would have made such a statement. RR10:25-26. Hambrick instead acknowledged, "[t]hat would be a bad thing to say because food loss doesn't apply to that . . . . It's a separate coverage that USAA extends to their members for general power outages." *Id.*

Following Hambrick's inspection, USAA advised Menchaca in writing:

> We received your *wind claim*, referenced below. *This type of loss is covered under your Homeowners policy*. However, the loss doesn't exceed your $2,020 deductible. Your policy only pays if a loss exceeds your deductible.
>
> Claim #: 2251656
>
> Date of Loss: September 13, 2008
>
> Loss Location: Spring, Texas

DX3 (emphasis added).

According to USAA, its letter to Menchaca was not a "denial letter[.]" RR4:26. To the contrary, USAA insisted that it did not deny any part of Menchaca's claim after Hambrick's inspection. *Id*. Following Hambrick's inspection of Menchaca's roof, living room, kitchen area, main hallway, electrical panel and fence, USAA's decision with respect to Menchaca's wind claim "was that it was a covered loss, but that cost to repair the damages did not exceed her deductible." *Id*.

USAA's second inspection and confirmation of coverage. In early March 2009, Menchaca contacted USAA seeking a copy of Hambrick's estimate and a re-inspection of her property by a USAA adjuster. RR12:185. USAA promised both and delivered neither. *Id*. Following another call from Menchaca on April 1, USAA decided on April 9 to reassign the claim to another outside adjuster, despite Menchaca's repeated requests for a USAA employee. *Id*. After Menchaca refused

to meet with another outside adjuster, USAA ultimately assigned Dave Glover to reinspect Menchaca's property. RR12:187.

Glover reinspected Menchaca's roof on April 26, 2009. RR12:188. Unlike Hambrick, who insisted he looked for but found no unsealed shingles, Glover admitted that he found unsealed shingles, right in the area where Menchaca reported she had seen shingles lifting up and down. RR4:77-78.

Even after USAA's inspector found unsealed shingles on Menchaca's roof, USAA never changed its position with respect to Menchaca's claim. RR9:33, 35-36. USAA never advised Menchaca that any part of her claim was not covered, including her claim for unsealed shingles. RR3:59, 69-70, 81; 4:26, 32; 7:34-35; 9:16, 35-36; DX3. Rather, as the second adjuster testified, "We never denied her claim. We considered it [unsealed shingles] in the estimate for wind damage." RR9:35-36.

Menchaca's inspection. Unlike USAA's adjusters, when Menchaca's experts inspected her roof they found significant wind damage. RR4:112-13, 115, 116-17, 130-31. As these experts explained, "If you're looking for lifted shingles you have to get down and lift shingles. And that's the only way to do it." RR4:120. If you just stood on the roof, there would be no visible damage. *Id*.

The absence of visible damage to one who merely stands on a roof does not mean the shingles are not damaged. RR4:122. An unsealed shingle is a damaged shingle. *Id*. The Texas Department of Insurance has defined unsealed, lifted shingles as damaged shingles. RR5:75. The sealant is needed to keep the shingles from continually flapping and in order to make the roof wind resistant. RR4:123-24. As a result of the damage to her roof, Menchaca's roof would not now pass a windstorm certification inspection for the Texas Department of Insurance. RR5:60, 66.

Menchaca's roof had not only unsealed shingles, but also numerous impact damages to every slope caused by the blowing debris of the storm. RR5:95-96. There were torn shingles and shingles with holes in them. *Id*. Without considering unsealed shingles, the impact damage to Menchaca's roof necessitated replacement of the roof at a cost of $22,000 to $29,000. RR5:101-02, 106, 112-13. USAA's shoddy inspections overlooked this wind-caused damage also. DX4.

Ms. Menchaca's experts also confirmed the Hurricane Ike damage to Menchaca's electrical panel. RR5:116; PX16. But Menchaca's experts determined that the cost of repairing her electrical panel would be approximately $3,300.00. *Id*. USAA stipulated to the reasonableness of these charges. RR3:5.

Ms. Menchaca's expert inspections also found covered interior damage that was overlooked by USAA's cursory inspections. RR4:136-38. Menchaca's experts found cracks and water damage in the ceilings of several rooms that USAA's adjuster claimed to have inspected. *Id*. The cost of repairing this Hurricane Ike damage was estimated to be approximately $24,000. RR5:114.

Finally, Menchaca's expert inspections also found wind damage to her fence. RR5:103. The cost of repairing that damage was estimated to be $4,700. RR5:104.

USAA reaffirms the claim was covered and never denied. Leesa Tomsett, USAA's trial representative and property claims examiner, was asked by USAA's own lawyer whether USAA ever denied Menchaca's Hurricane Ike claim. RR4:26, 32. Tomsett provided a one-word answer: "No." *Id*. Tomsett insisted that USAA did not deny Menchaca's claim because, according to USAA, "it was a covered loss[.]" RR4:26. That was also the position USAA took in writing. *Id*.; DX3.

USAA never advised Menchaca that any part of her claim was being denied, and USAA never advised Menchaca that any part of her claim was not covered. *See* RR3:59, 69-70, 81; 4:26, 32; 7:34-35; 9:30, 35-36; DX3. USAA never changed its decision that Menchaca's Hurricane Ike claim was "covered under [her] Homeowners policy." *Id*.

USAA acknowledged its obligation to provide Menchaca (and all policyholders) with a written explanation of the basis for its denial of a claim. RR3:69-70; 4:26; *see also* TEX. INS. CODE § 541.060(a)(3). USAA was adamant that it had never sent a letter explaining its denial of Menchaca's claim, because USAA had never denied Menchaca's claim. RR3:70; 4:26, 32. USAA assured the jury that "[i]f we would have found damages, we would have paid for it." RR9:60. Even in closing argument, USAA's lawyer insisted that "USAA didn't deny *anything*. We accepted the claim. Sadly, it was below the deductible." RR10:90 (emphasis added).

SUMMARY OF ARGUMENT

The jury accepted USAA's repeated assurances that Menchaca's Hurricane Ike claim was covered under the policy, that USAA had never denied "anything," and that had USAA found damage, USAA would have paid for it. Those assurances perhaps explain the jury's failure to find that USAA breached its policy obligations. But those same assurances also led the jury to find in favor of Menchaca on her independent extra-contractual claims under Chapter 541 of the Insurance Code.

USAA itself explained to the jury that "USAA's obligation is to adhere to the confines of the contract *and* make reasonable inspections." RR3:96 (emphasis added). The jury charge reflected USAA's admission, directing the jury to

determine whether USAA conducted a reasonable investigation of Menchaca's claim without regard to whether USAA had complied with the terms of the insurance policy. CR666. The jury charge tracked the language of the Insurance Code, and USAA did not object. *See* TEX. INS. CODE § 541.060(a); RR10:36. The Court should not impose recovery requirements that the Legislature did not.

The Court often has recognized that "[a]s a general rule there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered." *JAW the Pointe L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 602 (Tex. 2015). But this is not a case in which USAA denied a claim that is in fact not covered. USAA never denied "anything," and USAA determined that Menchaca's claim was "covered under [her] Homeowner's policy." RR10:91; DX3.

The absence of a contract breach finding cannot be twisted into an affirmative finding that USAA paid Menchaca for all of her covered Hurricane Ike damages. To the contrary, the jury affirmatively found that—as a result of its unreasonable investigation of Menchaca's covered claim—USAA did not pay Menchaca $11,350 in policy benefits USAA should have paid for her Hurricane Ike damages. CR667. The jury's affirmative findings of liability, causation, and damages under the Insurance Code are supported by the evidence and form an independent basis for the trial court's judgment.

USAA urges the Court to adopt a nonsensical rule that ignores the evidence of liability, causation, and damages and allows USAA to avoid paying for covered losses that it should and would have paid for—if only it had conducted a reasonable investigation of Menchaca's admittedly-covered Hurricane Ike claim. There is no legal or policy reason to adopt USAA's proposed rule.

ARGUMENT

Ms. Menchaca's actual damages were caused by USAA's failure to conduct a reasonable investigation of her claim. The Insurance Code claim is not dependent upon Ms. Menchaca's success on a breach of contract claim, and she did not forfeit her statutory rights just because USAA said her deductible wasn't met.

This Court repeatedly has recognized that "the insurer's failure to deal fairly and in good faith with its insured is a cause of action that sounds in tort, and is distinct from the contract cause of action for breach of the terms of an underlying insurance policy." *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995). "We do agree . . . that '[c]laims for insurance contract coverage are distinct from those in tort for bad faith; resolution of one does not determine the other.'" *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 n.8 (Tex. 1994) (quoting *id*. at 40).

Ms. Menchaca obtained the findings necessary to support her recovery under Chapter 541 of the Insurance Code, and those findings are amply supported in the evidence. USAA's contrary arguments confuse the concepts of coverage and breach and misread this Court's precedents.

I. Menchaca Obtained the Findings Necessary to Support Recovery as Prescribed by the Insurance Code.

Ms. Menchaca proved—and the jury found—that USAA refused to pay on a covered Hurricane Ike claim without conducting a reasonable investigation. CR666. Ms. Menchaca also proved—and the jury found—that the actual damages caused by USAA's unreasonable investigation were $11,350.00 in policy benefits that USAA should have paid, but did not pay, for Menchaca's Hurricane Ike damages. CR667. These are the only findings necessary to support Menchaca's independent recovery under the Insurance Code, and they are supported by the evidence. Consequently, the judgment for Menchaca should be affirmed.

A. The Legislature has established the requirements for recovery under Chapter 541.

The Legislature enacted Chapter 541 of the Insurance Code to regulate the business of insurance by defining and prohibiting certain unfair and deceptive acts or practices. TEX. INS. CODE § 541.001; *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 441 (Tex. 2012). In furtherance of its objectives, the Legislature established a private cause of action for "[a] person who sustains actual damages . . . caused by

[another] person engaging in" an unfair or deceptive act. TEX. INS. CODE § 541.151; *Ruttiger*, 381 S.W.3d at 441. And the Legislature declared that "[i]t is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to . . . refus[e] to pay a claim without conducting a reasonable investigation with respect to the claim[.]" TEX. INS. CODE § 541.060(a)(7).

In sum, the Legislature created a private cause of action for a person who sustains actual damages caused by an insurer's refusing to pay a claim without conducting a reasonable investigation of the claim. TEX. INS. CODE §§ 541.151, 541.060.

1. Breach of the insurance policy is not a statutory requirement.

An insurance company's breach of a policy obligation is not an element of the private right of action created by the Legislature. *Id*. To recover under Chapter 541, a plaintiff must prove only that the plaintiff sustained actual damages caused by the defendant's engaging in a prohibited act or practice. *Id*. Ms. Menchaca proved and obtained the required liability finding. CR666.

2. The jury charge tracked the statutory language.

This Court has repeatedly cautioned that "the jury charge for a statutory claim should track the statutory language" as closely as possible. *Felton v. Lovett*, 388 S.W.3d 656, 661 n.18 (Tex. 2012) (citing *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994)).

In keeping with the Court's admonition and the language of sections 541.151 and 541.060(a), the trial court submitted Menchaca's Insurance Code claim as follows:

> QUESTION NO. 2
>
> 2. Did USAA engage in any unfair or deceptive act or practice that caused damages to Gail Menchaca?
>
> Answer "Yes" or "No" as to each subpart.
>
> "Unfair or deceptive act or practice" means any one or more of the following: . . .
>
> D. Refusing to pay a claim without conducting a reasonable investigation with respect to a claim(s); or
>
> Answer: Yes . . .

CR 666.

As the Legislature intended, nothing within Question 2 required a finding of a breach of the insurance policy in order to find that USAA engaged in an unfair or deceptive act or practice that caused damages to Gail Menchaca. CR666. And, as the Legislature intended, the jury question asking whether USAA engaged in any

unfair or deceptive act or practice in violation of the Insurance Code was *not* predicated on a "yes" answer to the question asking whether USAA failed to comply with the policy. CR665-66.

As Chapter 541 requires, the charge obligated Menchaca to prove only that USAA engaged in the prohibited unfair or deceptive act or practice of refusing to pay a claim without conducting a reasonable investigation of the claim and thereby caused damage to Menchaca. TEX. INS. CODE §§ 541.151, 541.060; CR666. The question exactly tracked the submission recommended by the Pattern Jury Charge Committee. COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 102.14 & cmt., 102.18 (2014). While the Pattern Jury Charges are not "law," the "Committee includes a diverse group of practitioners and judges from throughout the state; they bring a wide range of expertise in the subjects covered . . . as well as a passion for crafting accurate charges that will assist the bench and bar." *Id.* at Preface p. xxvii. The Committee's "process ensures that the charge clearly and fairly submits the key issues to the jury [and] that it correctly reflects current law . . . ." *Id.*

Menchaca obtained the required liability finding, and it is supported by legally and factually sufficient evidence. USAA has never argued otherwise.

B. As a prevailing plaintiff, Menchaca is entitled to recover the "actual damages" that were "caused by" USAA's deceptive act.

Having established USAA's liability under Chapter 541, Menchaca is entitled to recover the "actual damages" "caused by" USAA's unfair or deceptive act. *See* TEX. INS. CODE §§ 541.151, 541.152; *Minn. Life Ins. Co. v. Vasquez*, 192 S.W.3d 774, 780 (Tex. 2006) ("Under the Insurance Code, an insurer that fails to pay claims promptly must pay for actual damages it causes as a result.").

1. As this Court has long-recognized, "actual damages" include policy benefits wrongfully withheld.

The Insurance Code expressly provides that "[a] plaintiff who prevails in an action under [section 541.151] may obtain: (1) the amount of actual damages, plus court costs and reasonable and necessary attorney's fees[.]" TEX. INS. CODE § 541.152; *see Ruttiger*, 381 S.W.3d at 441 (prevailing plaintiff under the Insurance Code is "entitled to actual damages"). "The amount of actual damages recoverable is 'the total loss sustained as a result of the deceptive trade practice.'" *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997) (quoting *Kish v. Van Note*, 692 S.W.2d 463, 466 (Tex. 1985)).

Nothing in the Legislature's plain language authorizing a prevailing plaintiff's recovery of "actual damages" precludes Menchaca's recovery of policy benefits. TEX. INS. CODE § 541.152. To the contrary, this Court has repeatedly held that "[a]ctual damages are those damages available under common law."

Arthur Andersen, 945 S.W.2d at 816; *accord State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 435 (Tex. 1995) ("actual damages" available under Insurance Code and DTPA "are those damages recoverable at common law"). And the Court has long recognized that benefit-of-the-bargain damages are one measure of direct actual damages. *See Arthur Anderson*, 945 S.W.2d at 816-17. "[B]enefit-of-the-bargain damages measure the difference between the value as represented and the value received." *Id*. at 817.

Because benefit-of-the-bargain damages are one measure of actual damages, it is no surprise that the Court has explicitly held that unpaid policy benefits are actual damages recoverable under the Insurance Code. *See Waite Hill*, 959 S.W.2d at 184-85; *Twin City*, 904 S.W.2d at 666; *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988). These decisions are controlling.

In *Vail*, the insurer advanced the same argument that USAA makes here, contending "the amount due under the policy solely represents damages for breach of contract and does not constitute actual damages in relation to a claim of unfair settlement practices" under the DTPA or Insurance Code. *Vail*, 754 S.W.2d at 136. This Court expressly rejected the insurer's argument and held policy benefits are recoverable as actual damages under the Insurance Code. *Id*. at 136-37. As the Court explained:

> "The fact that the Vails have a breach of contract action against Texas Farm does not preclude a cause of action under the DTPA and . . . the

> Insurance Code. . . . It would be incongruous to bar an insured—who has paid premiums and is entitled to protection under the policy—from recovering damages when the insurer wrongfully refuses to pay a valid claim. Such a result would be in contravention of the remedial purposes of the DTPA and Insurance Code."

Id. at 136.

The Vails' recovery of policy benefits was not dependent upon a jury finding that Texas Farm had failed to comply with the insurance policy. *See id*. at 136-37. The Court was concerned with the Vails' evidence, not with whether they had obtained a finding on a contract claim. *Id*. Thus the Court concluded: "The Vails offered evidence that Texas Farm Bureau had wrongfully denied the claim, resulting in a failure to pay $35,000 when due. The Vails thus sustained $35,000 as actual damages as a result of Texas Farm's unfair claims settlement practices." *Id*. at 137.

Vail squarely holds that amounts due under an insurance policy constitute actual damages under the DTPA and Insurance Code. *Vail*, 754 S.W.2d at 136. The Court reaffirmed this same holding seven years later. *See Twin City*, 904 S.W.2d at 666. In *Twin City*, the Court identified *Vail's* concern "with the insurer's argument that policy benefits improperly withheld were not 'actual damages in relation to a claim of unfair settlement practices.'" *Id*. (quoting *Vail*, 754 S.W.2d at 136). And the Court wrote: "In rejecting the insurer's argument, *we*

held that policy benefits wrongfully withheld were indeed actual damages under the DTPA and Insurance Code." *Id*. (emphasis added).

The Court had the opportunity to reverse course in 1995 and disclaim its holding that policy benefits are indeed "actual damages" available under the Insurance Code. *See id*. The Court refused to do so. *Id*.

Thereafter, in 1998, the Court again recognized the recovery of policy benefits as "an acceptable measure of damages" under the Insurance Code. *See Waite Hill*, 959 S.W.2d at 184. In *Waite Hill*, the Court acknowledged that the damage elements the plaintiff submitted on its statutory Insurance Code claims were for "the same damages covered under the policy: repair and restoration of property, lost profits, and replacement of lost solutions." *Id*. at 185. Yet the Court did not say these policy benefit damages were unavailable under the Insurance Code. *See id*. at 184-85. To the contrary, the Court explained that "[t]hese were contract, as well as tort damages," that "[a] party is generally entitled to sue and to seek damages on alternative theories," and that Waite Hill "was not required to object to the submission of more than one acceptable measure of damages[.]" *Id*.

Ms. Menchaca was entitled to sue on her "alternative" contract and Insurance Code theories and to seek unpaid policy benefits as actual damages under each theory. *Id*. From 1988 until today, this Court has repeatedly recognized that unpaid policy benefits are recoverable as actual damages under the

Insurance Code. The Court has never overruled *Vail*, *Twin City*, or *Waite Hill*. As recently as 2002, the Court emphasized that "*Vail* remains the law as to claims for alleged unfair claims settlement practices brought by insureds against their insurers." *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 259 (Tex. 2002) (quoting *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 149 (Tex. 1993)). There is no reason for the Court to reconsider those holdings.

Given this Court's consistent recognition that "actual damages" include unpaid policy benefits, the PJC expressly recognizes the appropriateness of a benefit-of-the-bargain measure of damages and the recovery of unpaid policy benefits under the Insurance Code. *See* PJC 115.13 & cmt. (2014) (Comment on "Policy benefits"). The PJC Committee possesses "a wide range of expertise in the subjects covered" and its "process ensures that the charge clearly and fairly submits the key issues to the jury [and] that it correctly reflects current law . . . ." *Id*. at Preface p. xxvii. USAA's argument is outside the mainstream and does not correctly reflect current law.

2. Menchaca proved her loss of policy benefits was "caused by" USAA's unreasonable investigation.

Because the Court has long recognized that actual damages may include unpaid policy benefits, Ms. Menchaca's obligation under the Insurance Code was to prove that her actual damages—policy benefits wrongfully withheld by USAA—were "caused by" USAA's unfair or deceptive act. *See* TEX. INS. CODE §

541.151 (establishing a private cause of action for "[a] person who sustains actual damages . . . caused by" another person engaging in an unfair or deceptive act); CR667. Ms. Menchaca submitted the causation issue to the jury. CR667. And the jury found in Menchaca's favor. *Id*.

In *Vail*, this Court held 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." *Vail*, 754 S.W.2d at 136 (emphasis added). But Menchaca has never argued that USAA's unfair, deceptive, unreasonable investigation caused her loss of policy benefits *as a matter of law*.

Instead, Ms. Menchaca recognized her need to prove and obtain a finding on causation following the Court's discussion in *Twin City*. *Twin City*, 904 S.W.2d at 666 n.3. While reiterating that policy benefits are indeed actual damages available under the Insurance Code, the Court in *Twin City* cautioned that not *every* violation of the Insurance Code will cause the loss of policy benefits as a matter of law. *Id*. The Court explained: "The reason is that some acts of bad faith, such as a failure to properly investigate a claim or an unjustifiable delay in processing a claim, do not *necessarily* relate to the insurer's breach of its contractual duties to pay covered claims, and *may* give rise to different damages." *Id*. (emphases added).

USAA tries to stretch the Court's *Twin City* footnote into a holding that policy benefits can *never* be recovered for an insurer's failure to properly investigate a claim. But that is not what the Court said. The Court noted that an insurer's failure to properly investigate does not "necessarily" relate to the insurer's duty to pay covered claims and "may" give rise to different damages. *Id*. The Court did not hold that an insurer's failure to properly investigate can "never" relate to the insurer's duty to pay covered claims and can "only" give rise to different damages. *Id*. *Twin City* recognizes that causation cannot be presumed as a matter of law in every case; causation depends on the particular facts of the case. *Id*.

In light of this Court's footnote in *Twin City*, the PJC provides: "Unless both the amount and causation of policy benefits as damages are conclusively established, the Committee believes it prudent to submit this element of damages to the jury." PJC 115.13 cmt. (2014). Ms. Menchaca heeded the PJC Committee's, and this Court's, prudent counsel and submitted both the amount and causation of policy benefits as damages to the jury. CR667.

In response, the jury found that the damages caused by USAA's unreasonable investigation of Menchaca's claim were $11,350.00 in unpaid policy benefits that USAA should and would have paid for Menchaca's Hurricane Ike damages if USAA had conducted a reasonable investigation. *Id*. The jury's

causation finding is supported by ample evidence proving that had USAA conducted a reasonable investigation of Menchaca's admittedly covered Hurricane Ike claim, it would have paid her at least an additional $11,350.00 in policy benefits. USAA refuses to address the evidence supporting the jury's finding of the amount and causation of policy benefits, but the Court should not. *See Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 347 (Tex. 2015).

"When determining whether any evidence supports a judgment, [the Court is] 'limited to reviewing only the evidence tending to support the jury's verdict and must disregard all evidence to the contrary.'" *Id*. (quoting *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990)). Further the Court "view[s] the evidence and possible inferences in the light most favorable to the verdict." *Id*. "If more than a scintilla of evidence supports the verdict, it must be upheld." *Id*.

Applying these traditional standards of review, the jury's finding of the amount and causation of policy benefits must be upheld. USAA insisted that Menchaca's Hurricane Ike claim—including her claim for roof damage and damage to her electrical box—was covered under the policy. RR3:59, 69-70, 81; 4:26, 32; 7:34-35; 9:30, 35-36; 10:90; DX3. USAA never denied "anything." RR10:90. And USAA assured the jury that "[i]f we would have found damage, we would have paid for it." RR9:60. *See also* RR3:83 (USAA would still pay "[i]f there was evidence to show that there was covered damage that we owed, yes.").

The jury agreed that Menchaca suffered a covered loss and that had USAA found damage, it would have paid for it. But the jury also determined that USAA did not find Hurricane Ike damage because USAA did not conduct a reasonable investigation of Menchaca's claim. *See* RR9:60 (USAA agreed that "[j]ust because you didn't find something, doesn't mean you looked for it."). The jury was able to consider and contrast the investigations performed by USAA's adjusters and Menchaca's experts, and the jury appreciated that USAA did not undertake a full and complete investigation before it refused to pay Menchaca's admittedly-covered Hurricane Ike claim. *See, e.g.*, RR7:42-44, 51-52, 54, 72, 74.

The jury also heard a great deal of evidence about the covered Hurricane Ike damages a reasonable inspection would have found. *See, e.g.*, RR4:109-10, 115, 130-32, 134-35; 5:94-96, 101, 115-16.

Unlike USAA's poor-performing adjusters, when Menchaca's experts inspected her roof they found significant covered damage. RR4:109-10, 112-13, 115, 116-17, 130-32, 134-35; 5:94-96, 101, 106-07, 114-16. Ms. Menchaca's roof not only had unsealed shingles, but also numerous impact damages to every slope caused by the blowing debris of the storm. RR5:95-96. There were torn shingles and shingles with holes in them. *Id*. Without considering unsealed shingles, the impact damage to Menchaca's roof necessitated replacement of the roof at a cost of

$22,000 to $29,000. RR5:101-02, 106, 112-13. USAA's shoddy inspections overlooked this covered damage. *Id*.

Further, while agreeing that the damage to Menchaca's electrical panel was covered under the policy, USAA allowed only a minimum amount for repairs. DX4. USAA admitted that neither Hambrick nor any other adjuster who inspected Menchaca's house was an electrical engineer or electrician qualified to determine whether that minimal repair was sufficient. RR3:88-89. USAA expected Menchaca "to have an electrician take a look at [the panel] and determine what had to be done." RR3:89-90. As the jury learned, Menchaca had an electrician estimate the cost of repairing her Hurricane-damaged electrical panel, and USAA stipulated at trial to the reasonableness of Menchaca's electrician's repair estimate totaling more than $3300—an amount itself above Menchaca's deductible. RR3:5; PX16.

Ms. Menchaca identified the Hurricane Ike damages that a reasonable investigation would have revealed to USAA. And the jury accepted USAA's assurances that it would have paid—and would still pay—for Menchaca's covered losses. RR 3:83; 9:60. Thus, there is ample evidence supporting the jury's findings that: (1) USAA violated the Insurance Code and committed an unfair or deceptive act in refusing to pay Menchaca's covered Hurricane Ike claim without conducting a reasonable investigation; (2) USAA's unfair or deceptive act caused

Menchaca damages; and (3) the damages caused by USAA's unfair or deceptive act totaled $11,350.00 in policy benefits that USAA should have paid, but failed to pay, Gail Menchaca for her Hurricane Ike damages. CR666-67. Those findings entitle Menchaca to recover against USAA under the Insurance Code.

II. The Court Should Not Adopt a Rule Barring Recovery that Evades Traditional Sufficiency Review.

USAA loses if the Court conducts a straightforward legal sufficiency review of the evidence supporting the jury's answers to the submitted liability, causation, and damages questions. So, USAA urges the Court to adopt a nonsensical rule that ignores the evidence of liability, causation, and damages and allows USAA to avoid paying for covered losses that it should and would have paid for had it conducted a reasonable investigation of Menchaca's admittedly covered Hurricane Ike claim. There is no legal or policy reason to adopt USAA's proposed rule. There are sound reasons to reject it.

A. The Court should not impose requirements the Legislature could have imposed but did not.

The plain language of the Insurance Code does *not* require a breach of contract finding in order to establish either USAA's liability for its deceptive practices or Menchaca's right to recover her actual damages. *See* TEX. INS. CODE §§ 541.151, 541.152. The Court should not impose a requirement for Menchaca's recovery that the Legislature could have imposed, but did not.

In matters of statutory construction, the Court's "goal is to ascertain and give effect to the Legislature's intent." *Ruttiger*, 381 S.W.3d at 452. The Court's task "is not to impose [its] policy choices or 'to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results.'" *Ritchie*, 443 S.W.3d at 866 (quoting *Iliff v. Iliff*, 339 S.W.3d 74, 79 (Tex. 2011)). The Court focuses on the words of the statute and "presumes the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact." *Ruttiger*, 381 S.W.3d at 452.

The Court focuses on the words the Legislature used because "[l]egislative intent is best revealed in legislative language." *Ritchie*, 443 S.W.3d at 866 (quoting *In re Office of Att'y Gen.*, 422 S.W.3d 623, 629 (Tex. 2013)). When the Court strays "from the plain language of a statute, we risk encroaching on the Legislature's function to decide what the law should be." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999). "Enforcing the law as written is a court's safest refuge in matters of statutory construction, and [courts] should always refrain from rewriting text that lawmakers chose . . . ." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 443 (Tex. 2009). "The judiciary's task is not to refine legislative choices . . . . The judiciary's task is to interpret legislation as it is written." *Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 847 (Tex. 2009).

This Court "presume[s] the Legislature included each word in the statute for a purpose . . . and that the words not included were purposefully omitted." *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). "It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose . . . [and] every word excluded from a statute must also be presumed to have been excluded for a purpose." *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981). "[I]t would be a usurpation of [the court's] powers to add language to a law where the legislature has refrained." *Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984). Moreover, the Court is "mindful of the principle that, when the Legislature has enacted a comprehensive statutory scheme, we will refrain from imposing additional claims or procedures that may upset the Legislature's careful balance of policies and interests." *Ritchie*, 443 S.W.3d at 880.

The Legislature has crafted a comprehensive scheme governing Menchaca's recovery for USAA's deceptive practices. Menchaca submitted and obtained favorable findings on the required elements of liability, causation, and damages. The Court should not impose additional procedures or requirements. *Id*.

B. This Court's precedents support the judgment.

USAA argues that this Court has embraced a rule precluding the recovery of policy benefits as a matter of law in the absence of a breach of contract finding. USAA is wrong.

1. USAA confuses the distinct issues of coverage and breach.

This Court has repeatedly "held that, '[a]s a general rule there can be no claim for bad faith when an insurer has promptly denied a claim *that is in fact not covered*.'" *JAW the Pointe, L.L.C v. Lexington Ins. Co.*, 460 S.W.3d 597, 602 (Tex. 2015) (quoting *Republic Ins. Co. v. Stoker*, 903 S.W.3d 338, 341 (Tex. 1995)) (emphasis added). Of course, this is not a case in which USAA "has promptly denied a claim that is in fact not covered." *Id*. "USAA didn't deny anything." RR10:90. And USAA determined that Menchaca's Hurricane Ike claim was "covered under [her] Homeowner's policy." DX3; *accord* RR4:26, 32.

Unable to show that USAA "denied a claim that is in fact not covered," USAA contends that the absence of a breach of contract finding is the equivalent of "a claim that is in fact not covered." Contrary to USAA's argument, there is a meaningful distinction between the absence of coverage and the absence of a breach finding—a distinction this Court recognized in *Stoker*. *Stoker*, 903 S.W.2d at 341 n.1.

In *Stoker*, the Court took "it as established that the uninsured/underinsured motorist coverage in the Stoker's policy [did] not cover their claim," a claim which had been denied in its entirety by Republic. *Id*. at 340-41. In that circumstance, the Court announced "the general rule [that] there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered."

Id. at 341. The Court agreed "that a policy claim is independent of a bad faith claim," but explained that it does not necessarily follow that "an insured may recover for a bad faith denial of a claim *even if the claim is not covered by the policy*." *Id*. at 340-41 (emphasis added).

In announcing a rule for cases involving claims that are "not covered," the Court expressly distinguished *Deese v. State Farm Mutual Auto Insurance Co.*, 838 P.2d 1265 (Ariz. 1992). *Stoker*, 903 S.W.2d at 341 n.1. *Deese* is a case like this one, in which the jury refused to find in the insured's favor on her contract claim but awarded policy-benefit damages on a bad faith claim. *Deese*, 838 P.2d at 1266. The Arizona Supreme Court affirmed the plaintiff's judgment, holding that the plaintiff "need not prevail on the contract claim in order to prevail on the bad faith claim[.]" *Id*. at 1270.

Rejecting the Stokers' reliance on *Deese*, this Court explained: "The insurance company in *Deese* did not deny coverage." *Stoker*, 903 S.W.2d at 341 n.1. "The dispute [in *Deese*] was whether portions of the medical bills were not reasonable and therefore not compensable." *Id*.

In distinguishing *Deese*, this Court recognized the distinction between coverage and breach. The absence of a breach finding is not equivalent to a lack of coverage; and it is the absence of coverage, not the absence of a breach finding, that precludes an insured's recovery on extra-contractual claims. *See Stoker*, 903 S.W.2d at 341 & n.1.

The Court reiterated the rule that coverage, not a policy breach, determines the availability of extra-contractual claims in 2010. *See State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010). As the Court explained in *Page*: "When the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive. . . . There can be no liability under either Article 21.55 or Article 21.21 of the Insurance Code, if there is no *coverage* under the policy." *Id.* (footnote and citation omitted) (emphasis added). Equally, however, the Court confirmed that "*to the extent the policy affords coverage, extra-contractual claims remain viable*." *Id.* (emphasis added).

The existence of coverage, not the existence of a breach finding, determines whether a plaintiff's extra-contractual claims remain viable. *Id.* The Fourteenth Court of Appeals recognized this distinction between coverage and breach earlier this year, writing:

> Although we agree with Great American that all of Primo's claims are contingent upon the existence of *coverage* under the policy, it does not necessarily follow that his claims are premised solely upon *breach* of the policy. For example, Primo alleged that Great American

> violated various provisions of the Texas Insurance Code. Although those provisions are contingent on the *existence of coverage*, it is possible that Great American could expose itself to statutory penalties under those provisions *without breaching any terms of the E&O policy itself*.

Primo v. Great Am. Ins. Co., 455 S.W.3d 714, 732 (Tex. App.—Houston [14th Dist.] 2014, pet. filed) (emphases added) (citations omitted).

It is the absence of coverage that defeats statutory claims under the Insurance Code, not the absence of a breach finding. The Court's most recent decision considering an insured's ability to recover policy benefit damages under the Insurance code underscores this point. *See JAW the Pointe*, 460 S.W.3d at 601-02, 610.

2. USAA misreads Castañeda.

Ignoring the Court's most recent writing, USAA insists that the Court's decision in *Provident American Insurance Co. v. Castañeda*, 988 S.W.2d 189 (Tex. 1998), is dispositive, arguing the questions presented in this case "were directly presented—and answered—in *Castañeda*." USAA BOM at 2. USAA misreads *Castañeda*.

First, *Castañeda* did not involve, or address the effect of, a jury's "no" answer to a breach of contract question. The Castañedas did not submit a policy breach question. *See Castañeda*, 988 S.W.2d at 192.

Second, unlike this case, *Castañeda* is a case—like *Stoker* and *JAW*—in which the insurer determined that the plaintiffs' claims were not covered under the policy, and denied them in their entirety. *Id*. Unlike the Castañedas' insurer, USAA determined that Menchaca's claim was covered under the policy and never denied anything.

Third, USAA wrongly asserts that the "*Castañeda* Court's analysis was predicated on an *assumption* of coverage[.]" USAA BOM at 8 (emphasis original). To the contrary, the Court began its review by "first consider[ing] whether there was any evidence to support a finding that Provident American denied Castañeda's claim without a reasonable basis or after its liability had become reasonably clear." *Castañeda*, 988 S.W.2d at 192. The Court did not assume coverage. The Court examined the evidence and "conclude[d] that, considering all the facts in existence at the time of the denial, there is no evidence that there was no reasonable basis for Provident American's denial of Castañeda's claim . . . or that liability had become reasonably clear." *Id*. at 193-94.

In examining "one of the reasons [Provident] gave for denying coverage," the Court was willing to "assume that the gall bladder exclusion was not a valid basis for denying coverage." *Id*. at 196-97. In assuming that *one* policy exclusion did not apply, however, the Court did *not* assume that Castañeda's claim was actually covered under the policy. *Id*. The Court could, and did, assume the gall

bladder exclusion was not a valid basis for denying coverage, because the Court found "no evidence in this record that no reasonable insurance company would have denied coverage *in light of other facts*." *Id*. at 197 (emphasis added). Even assuming one exclusion did not apply, "other facts" supported the denial of coverage. *Id*. The Court explained: "There is no evidence that, in view of the thirty-day provision, Provident American's liability under the policy was reasonably clear when it denied coverage or that it had no reasonable basis for denying coverage." *Id*. at 197.

Only after finding no evidence that Provident unreasonably "denied coverage" for the Castañedas' claims did the Court address the Castañedas' ability to recover policy benefit damages based upon Provident's failure to reasonably investigate the Castañedas' claim. *Id*. at 198. Faced with Provident's denial of coverage and the absence of any evidence demonstrating that Provident "had no reasonable basis for denying coverage," the Court understandably said: "With regard to the damages that might be recoverable if an insurer failed to adequately investigate a claim, we indicated in *Stoker* that failure to properly investigate a claim is not a basis for obtaining policy benefits." *Id*. (footnote omitted). *Castañeda* is a case like *Stoker* (and *JAW*) in which the insurer denied a claim that was in fact not covered under the policy. *Castañeda* is another case which holds

an insured cannot recover policy benefit damages in the absence of *coverage* under the policy. *Castañeda* is not dispositive of this case.

3. The Court's decision in *JAW* refutes USAA's argument.

The Court's recent decision in *JAW* confirms that the absence of a breach of contract finding does not preclude Menchaca's recovery of policy benefits on her statutory Insurance Code claims. *See JAW*, 460 S.W.3d at 601-02, 610. As the *JAW* case makes clear, the absence of a breach of contract finding does not by itself establish the absence of covered losses and is not determinative of whether the insured can recover policy benefits for a violation of the Insurance Code. *Id*.

In *JAW*, the insurer obtained summary judgment on JAW's breach of contract claims "leaving only JAW's statutory claims for trial." *JAW*, 460 S.W.3d at 601. JAW did not submit a breach of contract claim to the jury, and JAW accordingly never obtained a finding that its insurer, Lexington, had breached the policy. *Id*. JAW also did not appeal the trial court's summary judgment on its contract claim. *Id*.

According to USAA, JAW's failure to obtain a breach of contract finding should have been the end of JAW's Insurance Code claims, because JAW did not allege or prove an independent injury. *See JAW*, 460 S.W.3d at 602 (explaining that JAW did not seek "damages unrelated to and independent of the policy claim"). That is the argument USAA advances in this case: "Because Menchaca

failed to prove either a breach or an independent injury, her claim fails." USAA BOM at 10.

Were USAA's argument correct, *JAW* should have been over in two sentences, especially since—as USAA assures us—"[t]his Court has already decided this precise issue." *Id*. (citing *Castañeda*, 988 S.W.2d at 198). According to USAA, the rule is simple: Unless the insured obtains a breach of contract finding, the insured cannot recover policy benefits under the Insurance Code as a matter of law. No further analysis is required.

But that is not what this Court held in *JAW*. The Court did not accept USAA's argument that the absence of a breach of contract finding singlehandedly defeated JAW's Chapter 541 claim for actual damages equivalent to policy benefits. The Court did *not* write that "[b]ecause [JAW] failed to prove either a breach or an independent injury, [its] claim fails." *Compare* USAA BOM at 10 *with JAW*, 460 S.W.3d at 602.

Instead of accepting USAA's simplistic analysis, the Court found it necessary to examine the actual damages awarded to JAW and "decide whether the policy in fact provided coverage for those costs." *JAW*, 460 S.W.3d at 602. The Court did not equate the absence of a breach finding with an absence of covered losses under the policy. *Id*. The Court instead undertook a review of the evidence

in light of the policy language in order to determine whether JAW's claimed losses were or were not covered under the policy. *Id*. at 602-10.

If the absence of a breach finding were sufficient to preclude an insured's recovery of amounts that should have been paid under an insurance policy, the Court could and would have said so in *JAW*. The Court said no such thing.

As the Court recognized in *JAW*, it is not the absence of a breach finding that defeats the recovery of policy benefits in particular cases. It is the absence of coverage for the claimed losses that defeats the insured's recovery of policy benefits. That was this Court's holding in *JAW*: "Because the covered wind losses and excluded flood losses combined to cause the enforcement of the ordinances concurrently or in a sequence, we agree with the court of appeals that the policy's anti-concurrent-causation clause excluded coverage for JAW's losses, and JAW therefore cannot recover against Lexington on its statutory bad faith claims." *JAW*, 460 S.W.3d at 610.

The absence of coverage is not established by the absence of a breach of contract finding. And the absence of a breach finding, standing alone, is not dispositive of Menchaca's Insurance Code claim.

4. The absence of coverage negates causation; the absence of a breach finding does not.

It is certainly true that an insurer's failure to investigate a claim "that is in fact not covered" cannot cause a loss of policy benefits. *Stoker*, 903 S.W.3d at 341. That is the rule the Court recognized in *Stoker*. *Id*. If the damages sought by the insured are in fact not covered under the policy, then a failure to investigate those damages cannot cause the loss of policy benefits, because even a reasonable investigation would not have found damages covered by the policy.

If the insured's claim is not covered under the policy, then even a reasonable investigation would not, and could not, find covered losses that the insurer should have paid—because there never were any policy benefits owed at all. In that circumstance, it is the absence of coverage, and not the unreasonable investigation, that deprives the insured of policy benefits as a matter of law. An insurer's poor investigation cannot "cause" a loss of policy benefits that could never be owed.

But the absence of a breach finding is not an affirmative determination that no covered losses exist. And the jury's failure to find that USAA breached the insurance policy is not a finding that Menchaca's claimed losses—or the damages awarded by the jury—were not covered under the policy. Here, the jury likely answered "no" to the breach question because USAA insisted that it never denied anything and it would have paid for damages if it had found any. *See* RR3:83; 4:26, 32; 9:60; 10:90.

USAA's argument about the effect of the jury's "no" answer to the breach-of-contract question, "is a misinterpretation of the issue and the answer." *C&R Transp., Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966). A "no" answer does not mean the reverse of the failed fact finding. *Id.* A "no" answer to the breach of contract question is not a finding that USAA complied with its policy obligations and paid for all Menchaca's covered losses. *Id.*; *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). "The jury's failure to find that [USAA] breached the contract . . . does not mean the reverse, that [USAA] substantially performed the contract." *Grenwelge v. Shamrock Reconstructors, Inc.*, 705 S.W.2d 693, 694 (Tex. 1986). Much less is the jury's "no" answer to Question 1 an affirmative finding that Menchaca's claim was not covered by the policy. *See id.*

The jury did not find that Menchaca suffered no covered losses or that USAA paid for all Menchaca's covered losses. The jury in fact found to the contrary. *See* CR667. In response to Question 3, the jury affirmatively found the amount of unpaid policy benefits—$11,350—that USAA "should have paid Gail Menchaca for her Hurricane Ike damages." *Id.* The jury's affirmative finding in response to Question 3 is a finding that USAA failed to pay $11,350 it should have paid (and would have paid but for its unreasonable investigation) in accordance with the policy. *Id.*

USAA recognized that Question 3 required the jury to determine the amount of policy benefits USAA should have paid for covered losses under the policy. USAA instructed the jury that in awarding damages, "it's important for you to remember what the policy says," and USAA directed the jury to the policy provisions USAA wanted the jury to consider. RR10:91-92. In any event, USAA did not object to the damages question on the ground that it did not restrict the jury to, or require a finding of, covered losses. RR10:36-37. Assuming the damages question did not require a finding of covered losses in response to Question 3, the omitted element is deemed in support of the judgment. *See* TEX. R. CIV. P. 279 ("[O]mitted element or elements shall be deemed found by the court in such manner to support the judgment."); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 436-37 (Tex. 1995) (explaining that "[w]here, as here, a jury awards damages based on a charge that omits an element necessary to sustain a ground of recovery . . . the omitted element is deemed found in support of the judgment"). The Court cannot imply a finding of no covered losses contrary to the judgment. *Id*. The jury's finding—and the trial court's judgment—should be upheld. *See Gharda*, 464 S.W.3d at 347 ("If more than a scintilla of evidence supports the verdict, it must be upheld.").

C. USAA did not preserve its complaint.

Ms. Menchaca's Chapter 541 claim was properly submitted in accordance with the dictates of the statute, and the jury's favorable findings on liability, causation and damages are supported by the evidence. The trial court's judgment is correct, and the absence of a breach finding is immaterial.

In any event, however, USAA did not preserve its complaint that Menchaca can recover policy benefits only if she obtained a finding that USAA breached the insurance policy. USAA did not object to the submission of Menchaca's Chapter 541 claim on the ground that the liability question did not require a finding that USAA failed to comply with the policy. RR10:36. USAA likewise did not object to the Chapter 541 liability question on the ground that it was not predicated on an affirmative answer to Question 1 (the failure to comply question). *Id*. And USAA did not request an instruction directing the jury not to answer the Insurance Code liability question if it answered "no" to the failure to comply question. *Id*.

USAA's failure to object to the form of the Chapter 541 liability question waives USAA's right to argue that Menchaca must obtain a breach finding in order to prevail on her Insurance Code claim. *See In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003) (party's failure to object to form of charge waives complaint on appeal).

USAA argues that it properly preserved its complaint by objecting to the damages question. It did not. USAA objected to the damages question as follows:

> With respect to Question No. 3, we object to the combining of contractual damages from Question 1 and statutory damages from Question 2 for the reason that the Texas courts have held that extra contractual damages need to be independent from policy damages.
>
> And it's going to be unclear potentially if we get "yes" answers to 1 and 2 what the damages are based on. So we object to 3 as submitted by the plaintiffs.

RR10:36-37.

USAA did not advise the trial court that Menchaca could recover policy benefit damages only if she obtained a "yes" answer to *both* the contract and Insurance Code questions. *Id*. To the contrary, USAA objected that "it's going to be unclear potentially if we get 'yes' answers to 1 and 2." *Id*. That is the opposite of what USAA argues now. Now USAA argues that the jury's damage award would *only* be clear (and recoverable) if the jury had answered "yes" to both questions 1 and 2. *See* USAA BOM at 31 ("Absent a breach finding, Menchaca is not entitled to policy benefits.").

USAA objected to the combining of contractual damages and statutory damages for the reason that "extra contractual damages need to be independent from policy damages." RR10:37. Now USAA argues that extra-contractual damages do *not* need to be independent from policy damages, so long as Menchaca obtained a "yes" answer to the breach of contract question. *See* USAA BOM at 36

("Absent a breach finding, Menchaca is not entitled to policy benefits."). USAA never took that position in objecting to the charge. RR10:36-37.

As this Court has recognized:

> "Trial courts lack the time and the means to scour every word, phrase, and omission in a charge that is created in the heat of trial in a compressed period of time. A proposed charge, whether drafted by a party or by the court, may misalign the parties; misstate the burden of proof; leave out essential elements; or omit a defense, cause of action, or (as here) a line for attorney's fees. Our procedural rules require the lawyers to tell the court about such errors before the charge is formally submitted to a jury."

Cruz v. Andrews Restoration, Inc., 364 S.W.3d 817, 829-30 (Tex. 2012).

In order for USAA to argue that USAA's liability under the Insurance Code or Menchaca's recovery of policy benefits under the Insurance Code requires a finding that USAA breached the insurance policy, USAA had to have objected to the charge's failure to require such a finding. *Id*. Because USAA did not make such an objection, USAA cannot insist now that a policy breach is a required element of Menchaca's Insurance Code claim. *Id*.

III. Alternatively, Even if Accepted, USAA's Arguments Should Not Result in a Take-Nothing Judgment.

USAA's principal argument is that an insured must prove that the insurer breached the policy to recover for the insurer's independent, tortious violations of the Insurance Code. For the reasons discussed above, USAA's argument misreads this Court's authority and should be rejected. Even if this Court were inclined to

accept USAA's arguments, however, the Court should not render a take-nothing judgment against Menchaca.

A. The jury's findings should be reconciled by giving effect to the more specific findings in Menchaca's favor.

When the jury returned its verdict, its answers were not in conflict and could be reconciled by the fact that an insured can recover *either* for the insurer's breach of the insurance policy *or* for its tortious violations of the Insurance Code.[1] But if this Court agrees with USAA that an insured can recover for the insurer's tortious conduct *only* if the insured also proves a contract theory, then the jury's answers to Questions 1, 2, and 3 conflict. In that circumstance, Menchaca still would be entitled to judgment because the jury's specific findings, in response to Questions 2 and 3, would control over its general answer to Question 1.

1. If a breach-of-contract finding is necessary to recover under the Insurance Code, the jury findings are in apparent conflict.

Courts apply a de novo standard of review in deciding whether jury findings are in conflict. *See Bender v. S. Pac. Transp. Co.*, 600 S.W.2d 257, 260 (Tex. 1980); *Ford Motor Co. v. Miles*, 141 S.W.3d 309, 314 (Tex. App.—Dallas 2004,

[1] For that reason, Menchaca was not required to object to the jury's findings because there was no irreconcilable conflict in the findings under current Texas law; to the contrary, Question 1 could be properly disregarded as immaterial given Menchaca's right to recover under her alternative statutory claims. *See Beltran v. Brookshire Grocery Co.*, 358 S.W.3d 263, 268-69 (Tex. App.—Dallas 2011, pet. denied).

pet. denied). In this determination, the threshold question is "whether the findings address the same material fact." *Miles*, 141 S.W.3d at 314.

Accepting USAA's argument, the jury's answers to Questions 1, 2, and 3 address the same material fact: whether USAA failed to adequately pay Menchaca for covered damages under the policy. *See Bender*, 600 S.W.2d at 260; *see also Miles*, 141 S.W.3d at 315-18 (finding conflict where plaintiff's negligence and strict-liability theories embraced same ultimate fact); *Otis Spunkmeyer, Inc. v. Blakely*, 30 S.W.3d 678, 691 (Tex. App.—Dallas 2000, no pet.) (finding conflict between inconsistent jury findings on product-liability theories, where underlying defect was the same for both theories).

And accepting USAA's argument, these findings are in conflict. The jury failed to find that USAA breached the insurance policy in response to Question 1. CR665. But in response to Questions 2 and 3, the jury found that USAA failed to pay $11,350.00 it should have paid under the policy for Menchaca's Hurricane Ike damages, because of USAA's failure to conduct a reasonable investigation. CR666-67. Thus, in its answers to Questions 2 and 3, the jury found the opposite of what USAA argues it determined with its "no" answer to Question 1.

Where jury findings conflict, courts cannot simply choose or "strike down" one answer in favor of another. *See Bender*, 600 S.W.2d at 260; *Miles*, 141 S.W.3d at 314. Instead, courts are to reconcile the conflicting findings where there is a reasonable basis for doing so. *See Bender*, 600 S.W.2d at 260; *Miles*, 141 S.W.3d at 314.

The jury's apparently conflicting answers to Questions 1, 2, and 3 can be reconciled—and were in fact reconciled by the trial court—on the ground that Texas law permits an insured to recover "policy benefits wrongfully withheld" under either a contract or tort theory. *Vail*, 754 S.W.2d at 136; *see Twin City*, 904 S.W.2d at 666. As such, the jury's failure to find a breach in Question 1 fairly could be disregarded as immaterial. *See Spencer*, 876 S.W.2d at 157. But, if the Court accepts USAA's argument, the findings cannot be reconciled on the ground that they pertain to different legal theories.

2. The jury's specific findings in response to Questions 2 and 3 control over its more general answer to Question 1.

Even so, the Court can reconcile any conflict in the jury's findings in Questions 1, 2, and 3 by giving controlling effect to the jury's more specific findings in Questions 2 and 3. *See Lawson v. Lawson*, 828 S.W.2d 158, 161 (Tex. App.—Texarkana 1992, writ denied); *Harris County v. Patrick*, 636 S.W.2d 211, 213 (Tex. App.—Texarkana 1982, no writ). Under that principle, "[courts] should

always assume the honesty and at least ordinary intelligence of a jury and that they never intend that their specific findings of fact should be destroyed by a general finding in seeming conflict therewith." *Bragg v. Hughes*, 53 S.W.2d 151, 153 (Tex. Civ. App.—Galveston 1932, no writ).

Question 1 unquestionably is a more general finding than Questions 2 and 3. Question 1 makes reference to no particular action on USAA's part and contains no specific finding as to any particular fact in dispute. CR665. Questions 2 and 3, by contrast, set forth a specific reason for USAA's failure to pay policy benefits for covered damages and identifies the specific amount of policy benefits that should have been paid. CR666-67. These latter findings reflect the jury's intent to find that USAA underpaid policy benefits of $11,350.00 for the specific reason that USAA failed to conduct a reasonable investigation. CR666-67. Thus, the trial court—and this Court—could and should reconcile these findings by giving controlling effect to the jury's answers to Questions 2 and 3. *See Bender*, 600 S.W.2d at 260; *Lawson*, 828 S.W.2d at 161; *Patrick*, 636 S.W.2d at 213.

B. In the alternative, adopting USAA's proposed new rule would create a fatal, irreconcilable conflict in the jury's findings that would require remand for a new trial.

In the alternative, assuming, *arguendo*, that the Court (a) adopts USAA's novel approach to the law, and (b) decides that Question 1 was a material factual finding that was just as specific as the jury's findings in response to Questions 2

and 3, then the jury's answers to these questions are fatally in conflict. This is so because Questions 2 and 3 "would require a judgment in favor of the plaintiff," but Question 1 "would require a judgment in favor of the defendant." *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 695 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Little Rock Furniture Mfg. Co. v. Dunn*, 148 Tex. 197, 206, 222 S.W.2d 985, 981 (1949)); *Miles*, 141 S.W.3d at 315; *Otis Spunkmeyer*, 30 S.W.3d at 689.

Menchaca has given the Court two bases to reconcile these findings. First, Texas law allows Menchaca to present, and recover under, alternative legal theories of contract or tort. Second, the jury's more specific findings to Questions 2 and 3 control over its more general answer to Question 1. Absent one of those methods of reconciling these findings, they are in fatal, irreconcilable conflict. *See Miles*, 141 S.W.3d at 315, 319; *Otis Spunkmeyer*, 30 S.W.3d at 691. In that scenario, the Court cannot simply strike down the jury's answers to Questions 2 and 3 but instead must remand the case to the trial court for a new trial. *See Miles*, 141 S.W.3d at 315; *Otis Spunkmeyer*, 30 S.W.3d at 690.

C. Alternatively, overruling longstanding precedents should result in a new trial in the interest of justice.

1. *Vail, Twin City*, and *Waite Hill* accurately reflect current Texas law.

As shown above, USAA's arguments do not correctly reflect Texas law. As this Court recognized in *Vail*, "[t]he fact that the Vails have a breach of contract action against Texas Farm does not preclude a cause of action under the DTPA and . . . the Insurance Code. Both the DTPA and the Insurance Code provide that the statutory remedies are cumulative of other remedies." *Vail*, 754 S.W.2d at 136. *Vail* also established that policy benefits are a proper measure of "actual damages" for an insurer's Insurance Code violations. *Id.*

The Court reiterated these holdings in *Twin City* and *Waite Hill*. *Twin City*, 904 S.W.2d at 666; *Waite Hill*, 959 S.W.2d at 184-85.

USAA wants the Court to walk back these pronouncements and extend *Castañeda*, which applies only where there is *no coverage* for a claim, to situations where there *is coverage* but the jury does not expressly find a breach of the insurance policy. USAA's rationale for abandoning the Court's long-settled authority is a secondary source suggesting that *Vail* was overruled *sub silentio* by *Castañeda*.[2] USAA BOM at 22 n.13.

[2] Notably, USAA's trial counsel has suggested in *his* own treatise on Texas insurance law that *Vail* remains good law and that the Fifth Circuit's contrary pronouncement in *Great American Insurance Co. v. AFS/IBX*, 612 F.3d 800 (5th Cir. 2010), which USAA cites in its brief, was wrongly decided. *See* MARK L. KINCAID & CHRISTOPHER W. MARTIN, *Texas Practice*

But it wasn't. This Court affirmed, even four years after *Castañeda*, that "*Vail* remains the law as to claims for alleged unfair claim settlement practices brought by insureds against their insurers." *Rocor*, 77 S.W.3d at 259. Other courts have recognized the continuing validity of *Vail*. *See, e.g.*, *United Nat'l Ins. Co. v. AMJ Invs., LLC*, 447 S.W.3d 1, 11 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd) (rejecting insurer's argument, based on *Castañeda*, that "judgment cannot be rendered under the Insurance Code for amounts owed under the policy" and explaining "[t]his is contrary to both *Vail* and *Waite Hill Services*, and is not supported by the only decision by the Texas Supreme Court on which United relies"); *In re Oil Spill by the Oil Rig Deepwater Horizon*, MDL No. 2179, 2014 WL 5524268, at *16 (E.D. La. Oct. 31, 2014) ("Neither the Texas Supreme Court nor the Texas legislature has ever overruled or abrogated *Vail*.").

Further, *Twin City* has never been overruled or abrogated, either. To the contrary, courts still cite *Twin City* as currently reflecting Texas law, including the Fourteenth Court of Appeals earlier this year. *See Primo*, 455 S.W.3d at 732 (confirming that insurer's breach of good faith and fair dealing "sounds in tort, and is distinct from the contract cause of action for the breach of the terms of an

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Guide Insurance Litigation § 16:27, at 264-66 (2013-2014 ed.) ("To the extent that the Fifth Circuit held [in *Great American*] that an independent injury is required, some commentators believe the decision is incorrect in light of *Vail*."). Martin's conclusion was acknowledged by a federal district court which likewise decided that *Great American* misapplied the Fifth Circuit's own precedent by failing to appreciate the distinction between "no coverage" situations and covered claims. *See In re Oil Spill by the Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, MDL No. 2179, 2014 WL 5524268, at *16 (E.D. La. Oct. 31, 2014).

underlying insurance policy," and that "[t]hese claims also carry the potential for liability *without proof that Great American breached the E&O policy itself*") (emphasis added).

In both *Twin City* and *Vail*, this Court recognized policy benefits as a correct measure of damages for Insurance Code violations. *See Twin City*, 904 S.W.2d at 666; *Vail*, 754 S.W.2d at 136. The distinguished PJC committee specifically cites *Vail* as support for its suggestion to submit policy benefits in Insurance-Code-damages questions. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 115.10, 115.13 cmt. The Committee's suggestions are based entirely on "what [the Committee] perceives the *present law* to be." *See* PJC Introduction, at xxxi (emphasis added). Menchaca thus proceeded in reliance on *Vail*, *Twin City*, and the PJC in submitting "actual damages," including "policy benefits wrongfully withheld," as the proper measure of damages. CR667.

2. Adopting USAA's arguments would overhaul well-settled principles of insurance law and jury-charge practice.

If the Court accepts USAA's arguments, it will produce a sea change, not only with respect to the overturning of long-established authority in *Vail* and its progeny, but also in jury-charge practice.

This Court has never held that recovery under the Insurance Code is dependent on or should be predicated on a breach-of-contract finding. The jury charge here includes no such predicating instruction. CR665-66. Further, USAA did not object to the omission of any such instruction, RR10:36-37, and it did not submit a proposed, "substantially correct" instruction to that effect.

In addition, USAA did not object to the damages question as submitting an improper measure of damages under the Insurance Code. *See* RR10:36-37.

Finding in USAA's favor, either by (a) requiring a contract finding to recover under the Insurance Code or (b) clarifying how extra-contractual damages should be submitted to a jury, would undo this Court's precedent and excuse USAA's jury-charge waiver. In that event, the proper remedy is not to render a take-nothing judgment for USAA but instead to remand for a new trial. *See* TEX. R. APP. P. 60.2(f), 60.3; *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840 (Tex. 2000) (encouraging remand in the interest of justice when the Court alters or clarifies how a claim should be submitted to the jury); *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993) ("Remand is particularly appropriate where the losing party may have presented his or her case in reliance on controlling precedent that was subsequently overruled.").

PRAYER

The petition for review should be denied. Should the Court grant the petition, however, it should affirm the judgment because the facts and law support Ms. Menchaca's right to recover. Alternatively, a new trial should be granted. Gail Menchaca also asks for any additional relief to which she may be entitled.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of TEX. R. APP. P. 9.4(i)(2)(B) because this brief contains 13,596 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

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/s/ Jennifer Bruch Hogan
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Dated: November 20, 2015

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I certify that a true and correct copy of the above and foregoing was forwarded to all counsel of record by the Electronic Filing Service Provider, if registered; a true and correct copy of this document was forwarded to all counsel of record not registered with an Electronic Filing Service Provider and to all other parties as follows:

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