FIRST PARTY BAD FAITH CASES AFTER

UNITED NATIONAL INSURANCE CO. V. AMJ INVESTMENTS

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Arnold v. Nat'l Co. Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987)

> "A cause of action for breach of the duty of good faith and fair dealing is stated when it is alleged that there is no reasonable basis for denial of a claim or delay in payment or a failure on the part of the insurer to determine whether there is any reasonable basis for the denial or delay."

> "However, we would point out that exemplary damages and mental anguish damages are recoverable for a breach of the duty of good faith and fair dealing under the same principles allowing recovery of those damages in other tort actions."

Aranda v. Ins. Co. of North America, 748 S.W.2d 210 (Tex. 1988)

"It is well established under Texas law that accompanying every contract is a common law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract."

"This duty of good faith and fair dealing arises out of the special trust relationship between the insured and the insurer. . ."

Claimant/Insured must establish:

a. The absence of a reasonable basis for denying or delaying payment of the benefits of the policy; <u>AND</u>

b. That the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim.

Under the test, carriers will maintain the right to deny invalid or questionable claims, and will not be subject to liability for an erroneous denial of a claim.

*Vail v. Texas Farm Bureau Mutual Ins. Co., 7*54 S.W.2d 129 (Tex. 1988)

> "Our holdings in *Arnold* and *Aranda* are determinations pursuant to law that insurer's lack of good faith in processing a claim is an unfair or deceptive act. The Vails therefore stated a cause of action for unfair claims settlement practices under the DTPA and the Texas Insurance Code."

Twin City Fire Ins. Co. v. Davis, 904 S.W.2d 663 (Tex. 1995)

> "A breach of contract alone will not support punitive damages; the existence of an independent tort must be established . . . actual damages sustained from a tort must be proven before punitive damages are available."
>
> The Texas Supreme Court says that *Vail* means that policy benefits wrongfully withheld can be actual damages, but policy benefits wrongfully withheld will <u>not</u> alone support an award of punitive damages.
>
> The Court leaps to the conclusion that other Texas Courts have consistently recognized the independent injury requirement when dealing with bad faith claims brought against a carrier covered by the Worker's Compensation Act, and seemingly extends such holding to all bad faith actions in the first-party area.

Waite Hill Svcs. v. World Class Metal Works, 959 S.W.2d 182 (Tex. 1998)

By *per curium* opinion, Texas Supreme Court held that the damages awarded for both breach of contract and the extra-contractual causes of action were conclusively for the same loss, and reversed, saying that no double recovery would be allowed.

Republic Ins. Co. v. Stoker, 903 S.W.2d 338

Trial Court granted summary judgment on the contract issue; there was no coverage, but submitted to the jury alleged violations of the Insurance Code and breach of duty of good faith and fair dealing.

The Court acknowledges that breach of the duty of good faith and fair dealing is established when: (a) there is an absence of a reasonable basis for denying or delaying payment of benefits under the policy, and (b) the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim, citing *Arnold* and *Aranda.*

The insured argues that because a policy claim is supposed to be independent of a bad faith claim, that an insured should be allowed recovery for a bad faith denial of a claim even if the claim is not covered by the policy, citing *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).

Texas Supreme Court fails to find that an insurer can be liable for alleged improper denial of a claim where it is not covered by the policy, though does state, “we do not exclude, however, the possibility that in denying the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim.” *See Aranda*.

While this language was used in later decisions by the Texas Supreme Court to support its proposition that to recover damages in a bad faith case, the conduct must give rise to damages other than the damages recoverable under the policy, it is clear that the focus in *Stoker* was that there was no coverage, so there should be no bad faith.

Provident American Ins. Co. v. Castañeda, 988 S.W.2d 189 (Tex. 1998)

This case involved a medical insurance policy with numerous exclusions, some of which were utilized at different times by the insurer because of various medical conditions requiring the removal of gallbladders in two children of the main insured.

Only statutory claims were tried and no common law bad faith claim was submitted.

The Court held that evidence of coverage, standing alone, would not constitute evidence of bad faith denial, because a bona fide coverage dispute is, as a matter of law, no evidence that liability under the policy had become reasonably clear, nor can it constitute evidence that there was no reasonable basis for denying the claim.

The Texas Supreme Court assumed that there was coverage in this matter, but stated that not every erroneous denial of a claim subjects an insurer to liability, citing *Republic Ins. Co. v. Stoker, supra*.

"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. . . even the concurring justices in *Stoker* agree that the manner in which a claim is investigated must be the proximate cause of damages before there could be a recovery. . . none of the actions or inactions of Provident American [here] was the producing cause of any damage separate and apart from those that would have resulted from a wrongful denial of the claim."

"Provident American contends and we agree that its conduct in handling the claim did not cause any injury independent of the denial of policy benefits. The only damages awarded by the jury that were not policy benefits were for loss of credit reputation. But any loss of credit reputation stem from the denial of benefits, not from any failure of Provident American to communicate with Castañeda or to properly investigate her claim."

The dissent by Justice Gonzalez seems to properly analyze *Stoker* as holding that because of no coverage there, then no bad faith; hence, Justice Gonzalez draws a link between the independent requirement for damages, namely that if there is no coverage, it will be virtually impossible to show an independent recovery and damage, whereas if there is coverage, such as in *Castañeda,* then as long as there is some evidence to support a recovery of damages independent of the policy benefits, recovery should be allowed.

Nevertheless, many commentators read *Castañeda* to say that regardless of coverage, whether it exists or does not exist, the requirement does exist for injuries independent from those that would normally result from the denial of the claim, or no recovery and damages would be allowed for extra-contractual liability.

This became the key issue as to arguments and cases over the next 15 years.

Namely, does *Vail* still exist, and if so, was it narrowed in *Castañeda*, or was there an anomaly that could be distinguished in later cases.

Parkans Int'l. v. Zurich Insurance Co., 299 F.3d 514 (5th Cir. 2002)

The Court found there was no coverage, and thus no breach of contract.

The Court also made an interesting holding, which same may view as *dicta*, but bears close study,

"Moreover, the jury essentially found no tort injuries independent of the contract damages. There can be no recovery for extra-contractual damages for mishandling claims unless the complained of actions or omissions caused injury independent of those that would have resulted from a wrongful denial of policy benefits."

Interestingly, the Court's holding or *dicta*, as some have said, makes no reference to the fact that because there was no coverage, then there could be no wrongful denial of policy benefits; thus, insurers have relied upon this case for showing that the 5th Circuit has likewise required an independent injury or no extra-contractual damages will be allowed.

Wellisch v. USAA, 75 S.W.3d 53 (Tex.App—San Antonio, 2002, no pet.)

> "To recover damages under either the common law or the Insurance Code and DTPA, the violations must be a producing cause of the insured's damages; that is, the manner in which the claim is investigated must be the proximate cause of the damages as well with respect to breach of the duty of good faith and fair dealing."

United Services Auto. Assn. v. Gordon, 103 S.W.3d 436 (Tex.App—San Antonio, 2002, no pet.)

> The Gordons sued, and obtained jury findings that USAA failed to comply with the policy, engaged in unfair deceptive acts and practices, and failed to comply with its duty of good faith and fair dealing.
>
> The Gordons elected to recover on their DTPA claim plus attorney's fees.
>
> On appeal, USAA was able to show the Appellate Court that the only damages proven and awarded were damages arising from denial of the claim.
>
> "We agree with USAA that the Gordons failed to prove any damages apart from those stemming from the denial of the claim. An insured is not entitled to recover extra-contractual damages unless the complained of actions or omissions cause injury independent of the injury resulting from a wrongful denial of policy benefits."
>
> Thus, the Appellate Court reversed and rendered that USAA was not liable for any extra-contractual claims.

Minnesota Life Ins. Co. v. Vasquez, 192 S.W.3d 774 (Tex. 2006)

> "When insurers are negligent, the Texas Insurance Code does not grant policyholders extra-contractual damages. Instead, such damages are reserved for cases in which an insurer knew its actions were false, deceptive, or unfair."
>
> "We agree that when coverage is not reasonably clear, an insurer cannot sit on its hands or draw out an investigation to keep things that way. . . [however], there must be evidence that the insurer was actually aware that it was handling the claim in a way that was false, deceptive or unfair. . . the lower Courts erred in awarding extra-contractual damages."

Laird v. CMA Lloyds, 261 S.W.3d 322 (Tex.App—Texarkana, 2008, no pet.)

> Dispute arose over a homeowner's policy and whether the insurer owed additional sums for water leaks.
>
> "An insured is not entitled to recover extra-contractual damages unless the complained of actions or omissions caused injury independent of the injury resulting from a wrongful denial of policy benefits. . ." citing *Castañeda, Gordon,* and *Parkens. "*The threshold of bad faith is reached when a breach of contract is accompanied by an independent tort. Evidence that merely shows a bona fide dispute about the insurer's liability on the contract does not rise to the level of bad faith."

Mai v. Farmers Tex. Co. Mutual Ins. Co., 2009 WL 1311848 (Tex.App—Houston [14th Dist.] 2009)

Case involved an uninsured motorist claim by Plaintiff.

"Here, any finding of failure to properly investigate would not by itself mean that the claims were covered under the insurance policy; in other words, the alleged failure to properly investigate did not result in claim damages."

United National Ins. Co. v. AMJ Investments, 447 S.W.3rd 1 (Tex.App.—Houston [14th Dist.], pet. for review filed by 12/19/2014

Claims brought against United:

1.Breach of contract and bad faith.

2.Bad faith.

a. Traditionally constituted breach of the duty of good faith and fair dealing; and

b. Violations of the Texas Insurance Code and DTPA.

Now essentially subsumed in an alleged acceptable jury issue.

If you answered "Yes" to Question No. 1, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 2:

What sum of money, if paid now in cash, would fairly and reasonably compensate AMJ for its damages, if any, that resulted from the failure of United National you found in response to Question No. 1?

> In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.
>
> Consider the following element of damages, if any, and none other.

Answer in dollars and cents, for damages, if any.

a. The difference, if any, between the amount of the damages caused by Hurricane Ike that are covered under the insurance policy, and the amount paid to AMJ by United National.

Answer: $ 300,000.00

QUESTION NO. 3

Did United National engage in any unfair or deceptive act or practice that caused damages to AMJ?

> The term, "unfair or deceptive act or practice," has the meanings given in a. through d. below:

Answer "Yes" or "No" as to each:

a. Refusing to pay claims without conducting a reasonable investigation based on all available information;

Answer: NO

or

b. Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when United National's liability has become reasonably clear;

Answer: YES

or

c. Misrepresenting to AMJ a material fact or policy provision relating to coverage at issue.

Answer: NO

or

d. Attempting to enforce a full and final release of a claim from a policyholder when only a partial payment has been made, unless the payment is a compromise settlement of a doubtful or disputed claim.

Answer: YES

If you have answered "Yes" to one or more subparts of Question No. 3, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 4

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate AMJ for its damages, if any, that were caused by such unfair or deceptive act or practice of United National which you found in Question No. 3?

> In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

Answer separately, in dollars and cents, for of damages, if any:

a. Policy benefits for repair or replacement of AMJ's property due to damage to the property covered under United National's policy:

   Answer: $ 300,000.00

Jury found breach of contract.

Jury found $300,000.00 as the difference between the amount of damages caused by Hurricane Ike that were covered under the policy and the amount actually paid.

Jury found that United engaged in an unfair deceptive act or practice that caused damage.

Jury found that $300,000.00 would be compensation for such damage for the alleged unfair deceptive act or practice.

Judgment entered on the bad faith theory of liability, since it allegedly supported actual and statutory additional damages, along with prompt payment penalties and attorney's fees.

Appellate points:

1.Whether the evidence was legally and factually sufficient to support the finding that United failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when its liability has become reasonably clear.

2.Whether the evidence was legally and factually sufficient to support the award of compensatory damages.

3.Whether the absence of a separate injury prevents the insured from recovering amounts due under the policy as alleged damages for an Insurance Code violation.

4.Whether there was legally and factually sufficient evidence that United knowingly violated the Insurance Code.

The Court found that the absence of an independent jury did not foreclose liability for United's alleged violation of the Insurance Code.

As a matter of law, damages exist for the unfair refusal to pay the insured's claim in at least the amount of the policy benefits wrongfully withheld.

United argued on appeal that the judgment could not be rendered under the Insurance Code for amounts owed under the policy, and relied under *Castañeda, supra.*

Appellate Court distinguished *Castañeda,* by essentially stating that the insured had pleaded and proved that its claim was covered, and that United breached the contract.

Thus, the Appellate Court held that as a matter of law United's failure to pay when its liability was reasonably clear caused the insured to be damaged in an amount at least equal to the amount of the insurance proceeds that were wrongfully withheld, citing *Vail*.

Impact of decision:

1.Potentially re-establishes *Vail*.

2.Severally limits *Castañeda.*

3.Arguably repositions or correctly states that *Stoker* applies only to a non-covered claim.

4.Arguably suggests that if *Castañeda* did involve a covered claim, then plaintiff failed to plead and prove breach of the contract, which should have been done according to the Court, thus allowing *Castañeda* to be distinguished.

5.Arguably, the independent injury analysis has been turned on its head.

Petition for Review at the Texas Supreme Court:

1.Whether there is legally sufficient evidence to support the award of actual damages when there was no evidence that the repair costs sought were reasonable or necessary?

2.Can policy benefits, basically the damages flowing from the insurer's breach of contract, serve as the actual damages necessary to support an insured's claim for recovery under Section 541 of the Texas Insurance Code, or are such claims under the Insurance Code precluded as a matter of law because there is no independent injury?

3.Whether there is legally sufficient evidence that the alleged Insurance Code violations were a producing cause of damages when the jury found that the same damages occurred solely as a result of the alleged breach of contract; thus, can there be legally sufficient evidence when essentially there is no independent injury?

4.How can an insurer be found to have failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim or how can an insurer's liability become reasonably clear when multiple experts opine that the items on which the insurer questions coverage were not within the scope of the policy; in other words, doesn't *Castañeda* and *Vasquez* require, as a matter of law, that the Court find no bad faith because a bona fide dispute exists with respect to the claim itself and the reasonableness of the investigation?

The independent injury rule essentially boils down to this: are contractual benefits awardable as damages under the Texas Insurance Code?

1.Arguably, *Castañeda* and its progeny appeared to say "no;" *AMJ* appears to say "yes," basing its holding solely on *Vail*.

Amicus Curiae:

Need for the Court to square whether the independent injury rule requires a covered or uncovered claim, or whether that distinction is meaningless.

Specific issues:

a.Whether the alleged Insurance Code violation has been shown to be a producing cause of damages, without which the damages would not have occurred; arguably where the same damages would have occurred as a result of the policy breach alone, regardless of whether the jury finds an Insurance Code violation, then the Insurance Code violation should not be considered a producing cause of damages as a matter of law.

b.Otherwise, extra-contractual damages would be a routine addition to every breach of policy case, in violation of the principles outlined by the Texas Supreme Court in *Vasquez*.

c.Thus, theoretically, and to be consistent, even where there has been no contract breached, damages may be recoverable under the Insurance Code if the violation is shown to have caused damages, such as where the violation caused a delay and a policyholder made repairs, the building deteriorated in the interim making the repairs more expensive, and even though such additional amounts would not be recoverable under the policy, such damages would be independent from the amounts owed under the policy, and should be recoverable as a potential Insurance Code violation.

Is this a good idea?

a.Do we really want insurers exposed to extra-contractual damages when there is no policy coverage?

b.Is it better to have a rule such as *Stoker*, where there is no coverage, and hence, no possible way for any extra-contractual liability or damages.

c.Which poison does the insurer choose?

Rocha v. Geovera Specialty Ins. Co., 214 U.S. Dist. LEXIS 1990; 2014 WL 68648

A Motion to Remand case because of the joining of the adjusters, defeating diversity jurisdiction.

Insurer, which had diversity of jurisdiction citizenship as to the plaintiff, asserted that the allegations did not indicate the specific type and independent nature of the damages which would be recoverable against the adjusters based on an extra-contractual claim, and thus the adjusters were not properly joined.

The Court stated that the reliance by the insurance company on *Castañeda,* was only effective as to the analysis since *Castañeda* did indeed require that claims under the Texas Insurance Code establish a defendant's conduct was the cause in fact of the plaintiff's actual damages.

Hamilton Properties v. American Ins. Co., 2014 U.S. Dist. LEXIS 91882; 2014 WL 3055801

Involved alleged property damage following a hail storm.

Insurer denied coverage, contending that the damages could fall under the wear and tear exclusion, among other exclusions.

Court found that the plaintiff failed to meet its burden of proof to show that the claim was covered, as opposed to normal wear and tear or because of other non-covered perils, and granted summary judgment for the insurer on plaintiff's breach of contract claim.

As to the bad faith type actions, the Court favorably cited *Stoker*, stating that generally there could be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered, but did mention the exception that if the insurer committed an act so extreme that it would cause injury independent of the policy claim, then an extra-contractual claim may still survive.

Cardona v. ASI Lloyds, 2015 U.S. Dist. LEXIS 1477, Northern District of Texas, Dallas Division

> Based on *Rocha v. Geovera Specialty Ins. Co., supra,* at the Motion to Remand stage, allegations that the adjuster was directly responsible for committing violations of the Insurance Code does indeed satisfy *Castañeda*'s independent injury requirement.

USAA Texas Lloyds Co. v. Menchaca, 2014 Tex. App. LEXIS 8250; 2014 WL 3804602

Hugely important Hurricane Ike decision from the Corpus Christi Court of Appeals.

The jury found that USAA did not fail to comply with the terms of the insurance policy.

The jury answered "no" as to every unfair or deceptive act or practice that was presented to them with the exception that the jury found that USAA did refuse to pay a claim without conducting a reasonable investigation with respect to a claim.

The jury awarded small damages; the question was predicated on <u>either</u> an affirmative finding regarding breach of contract or an affirmative finding of an unfair or deceptive act or practice; worse, the issue contained an instruction that,

> "The sum of money to be awarded is the difference, if any, between the amount USAA should have paid Gail Menchaca for her Hurricane Ike damages and the amount that was actually paid."

QUESTION NO. 1:

1. Did USAA Texas Lloyd's Company ("USAA") fail to comply with the terms of the insurance policy with respect to the claim for damages filed by Gail Menchaca resulting from Hurricane Ike?

   Answer "Yes" or "No".

   Answer: NO

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:

A. Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the liability under the insurance policy issued to Gail Menchaca had become reasonably clear; or

   Answer: NO

B. Failing to promptly provide to Gail Menchaca a reasonable explanation of the factual and legal basis in the policy for the denial of a claim(s); or

   Answer: NO

C. Failing to affirm or deny coverage within a reasonable time; or

   Answer: NO

D. Refusing to pay a claim without conducting a reasonable investigation with respect to a claim(s); or

   Answer: YES

E. Misrepresenting to Gail Menchaca a material fact or policy provision relating to the coverage at issue.

   Answer: NO

If you answered "Yes" to Question No. 1 or any part of Question 2 or both questions, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 3:

3. What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Gail Menchaca for her damages, if any, that resulted from the failure to comply you found in response to Question number 1 and/or that were caused by an unfair or deceptive act that you found in response to Question number 2.

   The sum of money to be awarded is the difference, if any, between the amount USAA should have paid Gail Menchaca for her Hurricane Ike damages and the amount that was actually paid.

   In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

   Answer in dollars and cents for damages, if any.

   Answer: $ 11,350.00

After the verdict, USAA moved for entry of judgment in its favor on the basis that when no breach of contract is found, there could be no bad faith or extra-contractual liability as a matter of law.

Menchaca's lawyers argued that the jury's "no" answer on breach of contract should be disregarded because it was immaterial.

The Court did indeed decide to disregard that jury finding, and render judgment on the affirmative finding on extra-contractual claims, including the damages standard of the difference between the policy benefits and what was actually paid.

"Absurd to allow plaintiff to recover damages on the basis that the insurer failed to promptly pay a claim if the claim was not covered by the policy in the first place. On the other hand. . . as to unfair settlement practices, [such] deals with reasonable investigations. . . there is thus, a duty on an insurer, above and beyond the duties established by the insurance policy itself, to conduct a reasonable investigation prior to denying a claim. It follows that USAA could have fully complied with the contract even if it failed to reasonably investigate Menchaca's claim. [Further], even if USAA is correct that a claim based on an insurer's failure to conduct a reasonable investigation is barred when there is a finding of no coverage, the jury's answer to Question No. 1 does not definitively establish that there was no coverage. [After all], the parties do not dispute that Menchaca's policy generally covered damage to her property caused by Hurricane Ike. . . "

As to damages, USAA specifically argued that the plaintiff could not recover extra-contractual damages unless the complained of actions or omissions caused injury independent of the injury resulting from an alleged wrongful denial of policy benefits, citing *Gordon*, *Parkans Int'l.*, and *Castañeda.*

The Court is forced to acknowledge that *Castañeda* clearly stated that,

> "Failure to properly investigate a claim is not a basis for obtaining policy benefits."

However the Court notes that *Castañeda* favorably cited *Stoker*, which held,

> "Whether an insurer breaches his duty of good faith and fair dealing to its insured if it denies a claim for an invalid reason when there was at the time a valid reason for denial. . ." was found in the negative because the claim was not covered.

The Court distinguishes *Castañeda* and *Stoker* accordingly, by finding that Menchaca's claim was indeed covered under the USAA policy; thus, the Court holds,

> "We believe that this case, therefore, constitutes an exception to the general rule that breach of the policy must be established before policy benefits may be recovered." Improperly citing *Aiken*, 927 S.W.2d at 629; and [arguably, improperly] citing *Stoker*, 903 S.W.2d at 340-41.

The Court concludes as follows:

> "Under the unique circumstances presented in this case, USAA did not breach the policy but policy benefits are indeed the correct measure of damages caused by USAA's violation of the Insurance Code."

Petitioner, USAA, presents the following issues:

1.When a jury rejects an insured's claim that the insurer breached its contract, is the insured precluded from recovering on an extra-contractual claim?

2.When a jury rejects an insured's claim that the insurer breached its policy, can the insured nevertheless recover policy benefits if the same jury finds fault with the insurer's investigation?

3.Can a Trial Court disregard a jury question that is derived from the pleadings, tried to a jury, and allegedly supports a Take Nothing Judgment in the defendant's favor?

USAA states plainly that an insurer has a contractual obligation to pay covered claims, but because an insurer had no obligation to pay any additional amounts under the policy, and thus no contractual duty would be owed, then extra-contractual provisions of the Insurance Code should not support recovery of contractual benefits.

USAA cites *Castañeda*, and says that the Texas Supreme Court has squarely held that a failure to properly investigate a claim is not a basis in itself to require an insurer to pay policy benefits to its insured, and where the insured, such as here, proves no injury independent of what she alleged she was owed under the policy, and such was $0 because there was no contractual breach, then her claim should be barred, including any alleged extra-contractual claim.

Menchaca's lawyers contend that *Castañeda* is similar to *Stoker*, requiring that there be no coverage to eviscerate a favorable finding of extra-contractual damages, namely the benefit of the bargain type damages.

Menchaca's lawyers strongly argue based upon *Stoker*, *Twin City Fire v. Davis, Vail*, and *Transportation Ins. Co. v. Moriel*, that the claims for insurance contract coverage are indeed distinct and separate from those for bad faith, and the resolution of one allegedly does not determine the other, nor can it ever determine the other.

Both Menchaca's lawyers and the amicus curiae in *AMJ Investments* seemingly state that a breach is <u>not</u> a necessary predicate to extra-contractual liability.

Menchaca's lawyers suggest that while *Castañeda* provides that extra-contactual claims do not automatically give rise to damages equivalent to policy benefits if the claims are not covered, such does not allegedly help USAA because the claims were indeed covered regardless of the finding that a contract was not breached.

Reliance on *Castañeda* is criticized by Menchaca's lawyers because in *Stoker*, the statement that there could be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered, is <u>not</u> the situation in *Castañeda* or allegedly in this case.

WHERE DO WE GO FROM HERE?

What does independent injury now mean?

1.If a claim is not covered, should an insurer always win?

2.If there has been no contract breach, should an insurer always win?

3.If the only damages for extra-contractual claims are loss of policy benefits, is the independent injury analysis then eviscerated?

4.Will it suffice to simply say that an alleged Insurance Code violation cannot have been a producing cause of damages as a matter of law where the same damages would have occurred as a result of the policy breach?

Should there now be a jury issue on whether a claim was covered under the policy, separate and independent of whether the policy was breached?

Should it now be argued that a Court should never allow a jury to determine extra-contractual damages even if there is a breach of contract, unless the jury is instructed that no award can be made unless there are independent damages from the policy benefits?

Insurance guidance? **GOOD LUCK!**