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

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER'S MOTION FOR REHEARING

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations, representing 300,000 direct members and indirectly representing the interests of more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographical region of the country. An important function of the Chamber is to represent its members' interests by filing amicus curiae briefs in cases involving issues of national concern to American businesses.

The Chamber has no direct financial interest in the outcome of this litigation. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION

In an effort to reconcile its prior decisions in *Vail*, *Castañeda*, and *Stoker*[1] (among others), the Court's April 7, 2017 opinion attempted to clarify Texas insurance jurisprudence by enunciating five general rules regarding the interplay between breach of contract claims and tort claims under the Texas Insurance Code. The Chamber applauds the Court's objective of providing greater clarity and guidance is this area of law.

The Chamber respectfully submits, however, that the *Menchaca*[2] opinion should be further clarified to disentangle the overlapping concepts of "coverage," "policy benefits," and, importantly, the different measures of *damages* that might be available—whether under a contract theory or the Insurance Code—where a jury finds there is no breach of the insurance policy. Addressing the distinction between, and interplay among, policy benefits in particular and damages generally is crucial to achieve clarity regarding the availability of different

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[1] *Provident Am. Ins. Co. v. Castañeda*, 988 S.W.2d 189 (Tex. 1998); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995); *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988).

[2] *USAA Texas Lloyds Co. v. Menchaca*, No. 14-0721, 2017 WL 1311752 (Tex. April 7, 2017).

measures of damages in future cases that potentially affect all insured businesses in the state. The need for more definitive guidance for businesses, insureds, and courts is even more pressing in the wake of Hurricane Harvey—described by some as possibly the costliest disaster in United States history[3]—which will undoubtedly give rise to litigation for years to come.

USAA filed a Motion for Rehearing noting there is substantial confusion regarding the interpretation of the Court's decision and how it should be applied by the courts. MFR at 1-3. Indeed, plaintiff now argues *Menchaca*'s five rules, as applied here, mean the court of appeals' judgment should be affirmed instead of reversed. MRF Resp. at 15-18. The Chamber respectfully urges the Court to take this opportunity to clarify its opinion and its application to this case.

SUMMARY OF ARGUMENT

As damages for USAA's alleged breach of contract, the plaintiff in this case sought only the benefit of her bargain under the insurance

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[3] *See, e.g.*, Umair Irfan, *The stunning price tags for Hurricanes Harvey and Irma explained*, MSN.com (Sept. 19, 2017), http://www.msn.com/en-us/money/markets/the-stunning-price-tags-for-hurricanes-harvey-and-irma-explained/ar-AAs8NOo?li=BBnb7Kv&ocid=bdtdhp ("Estimates for the cost of Hurricane Harvey's damage have come in at $65 billion, $180 billion, and as high as $190 billion—the last of which would make it the costliest disaster in US history.").

policy—*i.e.*, the "policy benefits." At the trial court, she abandoned claims for any extra-contractual damages she may have suffered in addition to policy benefits. *Menchaca* at *1 n.3. Following a trial, the jury affirmatively rejected the plaintiff's claim that USAA breached the insurance policy. This Court concluded sufficient evidence supported the jury's no-breach-of-policy finding because the plaintiff's "damages were less than the amount of her deductible." *Menchaca* at *14.

Under these circumstances, this Court should make clear that, where there is an affirmative jury finding that the policy has not been breached, an insured should be precluded from recovering "policy benefits" as damages.

This principle has been recognized and relied on in the industry, by both insureds and insurers, for decades. Insureds rely on this settled expectation in deciding the amount of coverage needed in light of the cost of coverage and the risks they can bear. Similarly, insurers rely on the expectation that their agreement is to provide defined coverage, and accordingly not to provide coverage not agreed to, in setting the cost of coverage and calculating reserves necessary to ensure their overall coverage exposure. For both insureds and insurers, the settled

expectation is that contract benefits are only what the insured paid for—no more and no less.

Under this rule, where the insured submitted no claim for damages other than policy benefits, the jury's affirmative finding that USAA did not breach the policy should be dispositive under *Menchaca*'s "no-recovery rule." Rendering a take-nothing judgment, or providing additional guidance for submitting these issues to the jury on remand, would provide much-needed clarity regarding how the Court's five rules should be applied, and would avoid uncertain liability for businesses that have complied with their contractual policy obligations. Doing so would not constitute an advisory opinion, but would be specific to cases such as this where a jury finds an insurer did not fail to comply with its policy obligations.

The Court should grant USAA's motion for rehearing, and modify its opinion to confirm that where there is no breach of an insurance policy, damages for claims under the Insurance Code are limited to those extra-contractual measures that have been pleaded and proved to the jury under the Court's independent-injury rule. This should result in a take-nothing judgment in this case under the no-recovery rule—

because the plaintiff did not seek or prove any damages other than policy benefits. *See infra* Section I. Alternatively, in the event of a remand, the trial court should be instructed to submit separate damages questions with respect to the plaintiff's contract and Insurance Code claims (as USAA originally requested at trial), with proper instructions regarding available measures of damages under each theory. This would provide much-needed clarity for future litigants seeking to properly instruct juries in cases where an insured pursues policy benefits as damages under both breach-of-contract and statutory liability theories. *See infra* Section II.

DISCUSSION

The Chamber agrees with the Court that (1) "the trial court and court of appeals erred in disregarding the jury's answer to Question 1," and (2) reversal of the judgment in the plaintiff's favor is warranted. *Menchaca* at *14. However, the Chamber asks the Court to make clear that policy benefits are not available as damages under the Insurance Code where the jury finds there is no breach of the insurance contract. Here, because the jury found there was no breach of the policy, and because the plaintiff abandoned any claim for damages other than

policy benefits, damages are not recoverable as a matter of law under the five rules set forth in *Menchaca*.

I. Applying *Menchaca*'s Five Rules, the Court Should Render a Take-Nothing Judgment.

The Court's opinion rejects the notion that "an insured can never recover policy benefits as damages for a statutory violation." *Menchaca* at *7. The Chamber does not ask the Court to depart from that holding, but seeks further guidance for litigants based on the facts of this case. To harmonize this Court's decisions in *Vail*, *Castañeda*, and *Stoker*—and consistent with *Menchaca*'s five enunciated rules—the Court should clarify that policy benefits may *not* be recovered as statutory damages under the Insurance Code where the jury finds there is no breach of the policy in the first instance.

While the *Menchaca* opinion seeks to clarify the distinction between "coverage" and "benefits," it does not clarify the related questions of whether and to what extent "policy benefits" may be recoverable as damages under the Insurance Code. A plaintiff "who sustains actual damages may bring an action … for those damages caused by the other person engaging in an act or practice" that is prohibited by the Code. TEX. INS. CODE § 541.151. Here, the jury found

there was no breach of the policy because the plaintiff's "damages were less than the amount of her deductible." *Menchaca* at *14. Therefore, the plaintiff's statutory damages claim must be something other than benefit of the bargain—*i.e.*, something other than "policy benefits." Because the plaintiff here sought only policy benefits as damages, and she abandoned any claim for extra-contractual damages, the jury's no-breach finding precludes recovery under the Insurance Code.

This approach is consistent with *Vail*, where 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). Here, some benefits were available under the policy, but they fell below the deductible limit so there was no cash payment to the insured. *Menchaca* at *14. Presented with these facts, the jury found no breach of the policy—and so no "policy benefits" were "wrongfully withheld" under *Vail*. This approach is also consistent with *Twin City*, which strongly suggested that where a "failure to properly investigate a claim" actually relates to "the insurer's breach of its contractual duties to pay covered claims," that claim should be barred by a no-breach finding. *See Twin*

City Fire Ins. Co. v. Davis, 904 S.W.2d 663, 666 n.3 (Tex. 1995). Such a rule does not preclude all recoveries under the Insurance Code where there is no breach—but it precludes a benefit-of-the-bargain measure in the form of policy benefits.

The Court can avoid future confusion by clarifying the distinction between "policy benefits" and "extra-contractual damages" in the context of *Menchaca*'s five rules. If the jury finds there is no breach of the policy, the insured cannot recover policy benefits as statutory damages, but may be entitled to recover some extra-contractual measure. *See Castañeda*, 988 S.W.2d at 198 (acknowledging "there might be liability for damage to the insured *other than policy benefits* or damages flowing from the denial of the claim if the insured mishandled a claim") (emphasis added); *see also Progressive County Mut. Ins. Co. v. Boyd*, 111 S.W.3d 919, 922 (Tex. 2005) (rendered a take-nothing judgment on a failure-to-investigate claim where the plaintiff did not allege any damages "unrelated to and independent of the policy claim"); *Twin City*, 904 S.W.2d at 666 n.3 ("[S]ome acts of bad faith, such as a failure to properly investigate a claim or an unjustifiable delay in processing the 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."); *Stoker*, 903 S.W.2d at 341 (acknowledging "the possibility that in denying the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim").

This proposed clarification is consistent with *Menchaca*'s five rules. If the general rule is that "an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits," *Menchaca* at *4, that rule should equally apply to both the existence of coverage and to the amount of benefits due for a covered claim. As applied in this case: "an insured cannot recover [additional] policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to those [additional] benefits."

Due to the jury's no-breach finding (because the insured's damages fell under the deductible), this case does not fall into the entitled-to-benefits rule because no benefits were "wrongfully withheld." Again, as applied in this case: "an insured who establishes a right to receive [additional] benefits under the insurance policy can recover those [additional] benefits as actual damages under the Insurance Code

if the insurer's statutory violation causes the loss of benefits." *Menchaca* at *4. Because the insured did not establish a right to recover additional benefits under the policy (the jury rejected that contract theory), she cannot unilaterally elect to recover additional policy benefits under the Insurance Code.

Concluding that an insured might be able to recover "policy benefits" as actual damages under either a breach of contract theory or the Insurance Code is nothing more than an election of remedies issue, assuming both claims were proven. It can be a meaningful election in some cases because it might permit an insured to elect potentially higher remedies under the Insurance Code. *See Menchaca* at *8 ("[I]nsureds could elect to recover the benefits under the statute even though they also could have asserted a breach-of-contract claim.") (citing *Vail*, 754 S.W.2d at 136); *see also id.* at *3 ("[T]he Insurance Code supplements the parties' contractual rights and obligations."). But that election of remedies should be unavailable where the jury affirmatively determines there is no breach, thus rejecting any contract recovery.

Under *Menchaca*'s independent-injury rule, "if an insurer's statutory violation causes an injury independent of the loss of policy

benefits, the insured may recover damages for that injury even if the policy does not grant the insured a right to benefits." *Menchaca* at *4. Had the plaintiff submitted an alternative damage measure—something independent of a right to policy benefits—then she might have been able to recover under the independent-injury rule. But she did not. As the Court notes, as damages for her claims for "breach of the insurance policy and unfair settlement practices in violation of the Texas Insurance Code," the plaintiff "sought only insurance benefits under the policy, plus court costs and attorney's fees." *Menchaca* at *1. She abandoned her claim for extra-contractual damages, limiting her statutory claim to "benefits that should have been paid pursuant to the policy." *Id.* at *1 n.3 (internal quotes omitted).

Therefore, *Menchaca*'s no-recovery rule applies because "an insured cannot recover *any* damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits." *Menchaca* at *4 (emphasis in original). The plaintiff submitted one damages theory to the jury: that she should have received more policy benefits under her insurance contract. Whether that claim is articulated in

terms of coverage or breach is irrelevant—it does not resolve the question of available damages. Where the jury finds no breach, that finding should preclude recovery of additional policy benefits as a matter of law because the parties to the insurance policy agreed to those terms.[4]

On these facts, because the insured sought only policy benefits as damages, the Court should render a take-nothing judgment based on *Menchaca*'s five rules. Otherwise, as USAA has noted in its Motion for Rehearing, plaintiffs in other cases will rely on the Court's opinion for the notion that an insured may recover contract damages even when a jury finds there has been no breach—and regardless of whether they have alleged or proved any independent injury.

II. If it Remands, the Court Should Clarify the Circumstances in Which "Policy Benefits" are Recoverable as Damages Under the Insurance Code.

If the Court does not render judgment, it would be beneficial to further clarify its decision with respect to available measures of damages where there is no breach of the insurance policy. In the context

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[4] An insured seeking policy benefits as a measure of damages bears the burden of establishing coverage exists in the first instance with respect to the benefits she seeks to recover. *See JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 603 (Tex. 2015).

of liability, the *Menchaca* opinion addresses confusion in prior case law regarding the terms "breach" and "coverage." *Menchaca* at *6–7. But the opinion fails to resolve that confusion in a practical way with respect to "policy benefits" and whether they can be recovered as *damages* under the Insurance Code where the jury finds the insurance policy was not breached because the insurer did not withhold benefits to which the insured was entitled.

In concluding that the trial court erred by disregarding Question 1, *Menchaca* acknowledges there was evidence the insured's "*damages were less than the amount of her deductible*," and thus "at least some evidence supported the jury's finding that USAA did not fail to comply with its obligations under the policy." *Menchaca* at *14 (emphasis added). In other words, there was no breach of the policy agreement because the insured was not entitled to any policy benefits above what was paid (or, in this case, applied to the deductible).[5]

The plaintiff nonetheless seeks to recover "policy benefits" as damages based on her claim that the amount that should have been

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[5] In fact, the jury rejected the plaintiff's claim that USAA failed "to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the liability under the insurance policy"—*i.e.*, coverage—"had become reasonably clear." *Menchaca* at *2 n.4.

covered was something more than USAA applied to her deductible. Because her contract claim failed, she pursues this benefit-of-the-bargain measure—and only this measure—as actual damages under the Insurance Code in Question 3, where the jury awarded her $11,350.

There is plainly a conflict between the jury's finding that the insurer complied with the policy and the jury's finding that the insurer should have compensated the insured for additional unpaid "policy benefits." *See Menchaca* at *7 (noting that where a policy covers a loss, "the insurer necessarily breaches the policy if it fails to pay benefits for the loss because the insured is entitled to those benefits"). Although she alleged an Insurance Code violation, the plaintiff framed her damages claim under the Insurance Code solely in terms of "policy benefits;" thus, the jury's finding of no breach should have precluded a benefit-of-the-bargain recovery under the Insurance Code.

That conclusion would not prevent future litigants from pursuing damages that arise independent of, or in addition to, policy benefits they have already received (if they are entitled to them). But to allow "policy benefits" as the sole measure of damages where the policy is not breached invites materially conflicting jury findings.

That conflict is not resolved by the Court's opinion, which attempts to distinguish the concepts of coverage and benefits without clarifying available damage measures where there is no breach. The Court holds that "[w]hile an insured cannot recover policy benefits for a statutory violation unless the jury finds that the insured had a right to the benefits under the policy, the insured does not *also* have to establish that the insurer breached the policy by refusing to pay those benefits." *Mechaca* at *7 (emphasis in original). But this statement does not address how unpaid policy benefits could qualify as actual damages caused by a statutory violation when the jury has affirmatively found there is no breach of the insurance policy in the first instance.

Attempting to reconcile the jury's no-breach finding with its award of policy benefits as statutory damages, the Court focuses on coverage versus breach. "In one sense, no relevant distinction exists between 'breach' and 'coverage' in this context because no breach can occur unless coverage exists, and if there is coverage, there is necessarily a breach if the insurer fails to pay *the amount covered*." *Menchaca* at *7 (emphasis added). This is clear Black Letter Law—and in this case it should be dispositive. Here the insurer did not "fail[] to pay *the amount*

covered" and thus there was no breach (as the jury found in Question 1), and the insured was not deprived of the benefit of her bargain.

That should have ended the inquiry. But the opinion goes on to explain that "[a]lthough our prior decisions refer interchangeably to both '*breach*' and '*coverage*,' our focus in those cases was on whether the insured was entitled to *benefits* under the policy, because an insurer's statutory violation cannot 'cause' the insured to suffer the loss of benefits unless the insured was entitled to those benefits." *Menchaca* at *7 (emphasis added). It is unclear why this distinction makes a difference where the jury finds there is no breach. Whether an insured is entitled to "benefits under the policy" is a question that relates equally to underlying coverage determinations and the amount of policy benefits the insured is entitled to receive (even if falling under the deductible, as in this case, or in other circumstances where, for example, a particular type of claim is subject to specified limits). In other words, if a statutory violation cannot "cause" the loss of benefits where there is no right to benefits in the first instance, a statutory violation also cannot "cause" the loss of benefits where there is no right to *more* benefits than have already been paid or applied to a deductible.

Elsewhere in the opinion the Court seems to confirm that the distinction should not make a difference. The Court states that the Insurance Code "does not create insurance coverage or a right to payment of benefits that does not otherwise exist under the policy." *Menchaca* at *3 (citation omitted, emphasis added). This statement supports the insurer's position here: whether the dispute is characterized as about underlying coverage or a deficient payment (or an inadequate credit toward a deductible), the right to any particular amount of policy "benefits" still emanates from the insurance contract itself. If the jury finds the insurer did not breach that contract in declining to pay a particular amount of policy benefits, the insured should not be permitted to pursue those same benefit-of-the-bargain damages under a statutory theory of liability. *See id.* at *6 ("If the insurer violates a statutory provision, that violation—at least generally—cannot cause damages in the form of policy benefits that the insured has no right to receive under the policy.") (footnote omitted).

The Court's analysis effectively renders the question of breach meaningless; and, at least according to the plaintiff's interpretation of the decision, allows an insured to pursue benefit-of-the-bargain

damages under the Insurance Code irrespective of an insurer's compliance with the policy. But it should not matter whether the insurer wrongfully denied *any* benefits (based on a coverage determination), or wrongfully denied *some* benefits (because of a deficient payment). If the only damages a plaintiff pursues are "policy benefits," then that benefit-of-the bargain measure should be precluded as a matter of law if the jury finds the insurer complied with the policy's terms.

Such a rule does not ask this Court to adopt a hard line that statutory damages are always unavailable where there is no breach. Rather, it would merely confirm that even where there is coverage, where policy benefits fall under the deductible and the jury finds no breach, additional "policy benefits" should not be an available measure of damages under the Insurance Code. Here, by finding no breach of the policy but awarding a greater amount of "policy benefits" as damages, the verdict fatally conflicts and should preclude any recovery.

In the event of a remand in the interest of justice, the Court should provide more definitive guidance by expressly confirming that policy benefits are not available as a measure of damages under the

Insurance Code where the jury finds there is no breach of the policy. Whether and to what extent an insured may recover some extra-contractual measure of damages under the "independent injury rule" should be resolved based on the pleadings and evidence presented in the particular case. But in light of *Menchaca*'s five rules, further guidance is necessary regarding the submission of these issues to juries in bad-faith lawsuits, and the measures of available damages where the jury finds there is no breach. For example, among other guidance sought by the Petitioner, the Court should clarify that when an insured pursues damages for both breach of the policy and for torts under the Insurance Code—and when there is a proper objection—the trial court should submit separate damages questions for each claim and properly instruct the jury regarding available measures of damages for each.

CONCLUSION

For these reasons, the Chamber supports the Petitioner's motion for rehearing and its request that the Court clarify its opinion. Consistent with the five rules delineated in *Menchaca*, the Chamber urges the Court to clarify that damages under the Insurance Code do not include policy benefits where the jury has found the insurer did not

breach the insurance contract. That conclusion should apply equally whether the no-breach finding is based on lack of coverage or failure to pay full benefits to which an insured claims entitlement.

The Court's decision to remand—instead of rendering judgment for USAA under the facts of these case—suggests to litigants that they might be able to pursue benefit-of-the-bargain damages even where the jury has found the insured received the benefit of her bargain under the insurance contract. The Court should avoid such misimpression by confirming that, while additional extra-contractual damages may be available in a special case, this plaintiff has not sought such alternative measures, so her claim fails as a matter of law. Such a holding will provide much-needed guidance to other litigants and courts seeking to apply the Court's decision to future litigation, and will enable businesses to more accurately assess potential statutory liability where they have complied with their policy obligations.

In light of the significance of the *Menchaca* opinion for thousands of Texas businesses, and the tremendous insurance issues that will arise from recent weather-related events, the Chamber suggests that entertaining re-argument by the parties would assist the Court in

addressing the clarifications sought by USAA's motion for reconsideration. *See* TEX. R. APP. P. 59.2.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations of TEX. R. APP. P. 9.4(i)(3) because this brief consists of 4,262 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

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