INSURANCE COVERAGE:
MENCHACA II AND BIFURCATION OF TRIAL ISSUES

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CHAPTER 2

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INSURANCE COVERAGE: *MENCHACA II* AND BIFURCATION OF TRIAL ISSUES

I. INTRODUCTION

Query: May an insured recover insurance policy benefits based on the insurer's violation of the Texas Insurance code even though the jury failed to find that the insurer failed to comply with its obligations under the policy?

Answer: Perhaps.[1]

In 2018, the Texas Supreme Court announced its decision in *USAA Texas Lloyds v. Menchaca*, ___S.W.3d ____, 2018 WL 1866041 (Tex. 2018) (*Menchaca II*). In it, the court withdrew its previous opinion handed down a year earlier and explained:

> We unanimously reaffirm the legal principles and rules announced in that opinion, but we disagree on the procedural effect of those principles in this case. Because a majority of the Court agrees to reverse the court of appeals' judgment and remand the case to the trial court for a new trial, our disposition remains the same.

See id. at *3. In *Mechaca II*, the court announced "five rules addressing the relationship between contract claims under an insurance policy and tort claims under the Insurance Code." [2] In this brief presentation, we will explore the facts and holding of the court in *Menchaca II*, the five rules set forth in the opinion and the possibility of bifurcation of contractual from extra-contractual claims based upon this case.

II. THE FACTS

Menchaca II was a storm case—a first party claim[3]—by an insured against its homeowner's insurer for losses allegedly suffered as a result storms occasioned by Hurricane Ike. USAA determined that the homeowner suffered covered losses but declined to pay any benefits since the total estimated repair costs did not exceed the insurance policy's deductible. USAA re-inspected the property at the insured's request and the re-inspection confirmed USAA's initial findings. It once again declined payment and the insured sued for breach of contract and for unfair settlement practices in violation of the Texas Insurance Code. The Supreme Court noted that as to both claims, Menchaca sought "only insurance benefits under the policy, plus court costs and attorney's fees." [4]

A. The Jury Questions

The case was tried to a jury. Question 1 asked whether USAA failed "to comply with the terms of the insurance policy with respect to the damages filed by Gail Menchaca resulting from Hurricane Ike." The jury answered, "No." Question 2 asked whether USAA engaged in various unfair or deceptive practices, including whether USAA refused *"to pay a claim without conducting a reasonable investigation with respect to"* that claim.[5] The jury answered, "Yes." Question 3 asked the jury to determine the amount of Menchaca's damages that resulted from either USAA's failure to comply with the policy or its statutory violations, calculated as "the difference, if any, between the amount USAA

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[1] This may cause some in the audience to recall that famous dialogue in the philosophical cult favorite, *Dumb and Dumber*:

> **Lloyd Christmas (Jim Carrey)**: What do you think are the chances of a guy like [me] and a girl like [you] winding up together? [. . .] What are my chances?
>
> **Mary Swanson (Lauren Holly)**: Not good. . .I'd say more like one out of a million.
>
> **Lloyd Christmas**: So you're telling me there's a chance. . . Yeah!

[2] *See id*.

[3] A "first party claim" is one asserted by an insured against his or her insurers for losses covered under a policy of insurance. This is distinguished from a "third party claim" in which an insured seeks coverage for injuries to a third party. *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16 (Tex. 2007).

[4] *See USAA Texas Lloyds v. Menchaca, supra* at *2.

[5] This was the only affirmative finding against USAA concerning the Insurance Code violation. *USAA Texas Lloyds v. Menchaca, supra* at n. 4.

should have paid Gail Menchaca for her Hurricane Ike damages and the amount that was actually paid."[6] The jury responded, "$11,350."[7]

B. The Trial Court's Rulings

Both parties moved for judgment on the verdict: USAA contended that since the jury failed to find that it failed to comply with the contract, Menchaca could not recover extra-contractual damages as a matter of law (i.e. no contract violation = no extra-contractual liability). Menchaca argued for judgment in her favor based on the answers to Question 2 and 3, contending that neither of which required a "Yes" answer to Question 1. The trial court disregarded the jury's answer to Question 1 and entered judgment for Menchaca. The court of appeals affirmed. The Supreme Court reversed and remanded the case for a new trial.

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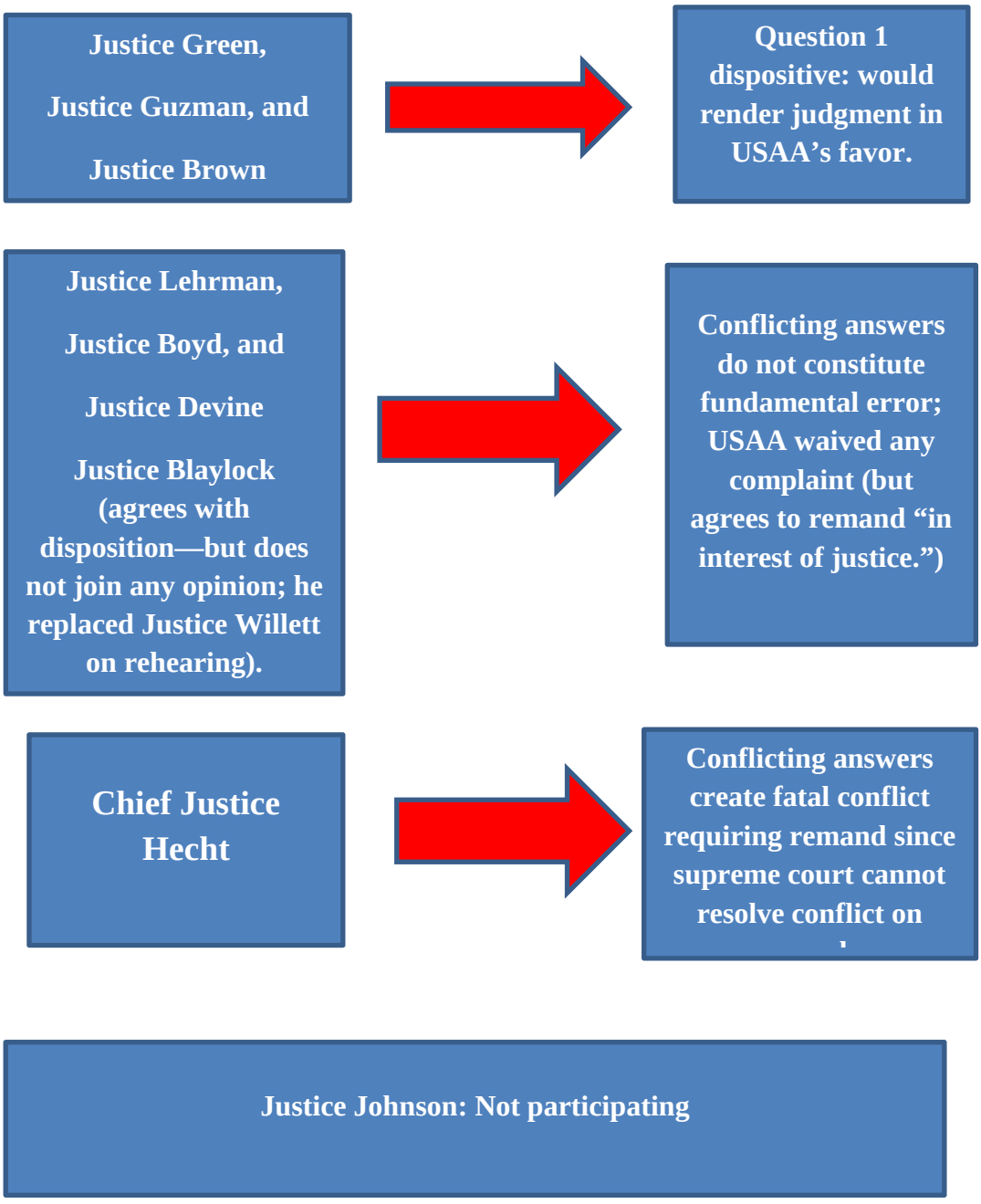
[6] The Supreme Court noted:

> Specifically, Question 3 asked: "What sum of money ... 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 question thus required the jury to determine damages resulting from either a contract breach or a statutory violation or both. The charge instructed the jury to answer Question 3 only if it "answered 'Yes' to Question No. 1 or any part of Question No. 2 or both questions." The charge then instructed the jury 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."

See USAA Texas Lloyds v. Menchaca, supra at *2.

[7] *See USAA Texas Lloyds v. Menchaca, supra* at *2.

C. The Supreme Court's Holdings[8]



The Supreme Court recognized the confusion generated by statements in *Provident American Insurance Co. v. Castañeda*, 988 S.W.2d 189, 198 (Tex. 1998)(stating that an insurer's "failure to properly investigate a claim is not a basis for obtaining policy benefits") and *Vail v. Texas Farm Bureau Mutual Insurance Co.*, 754 S.W.2d 129, 136 (Tex. 1988)(stating 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").[9] To provide clarity to principles regarding the relationship for the breach of an insurance contract and a breach of the Insurance Code, the court, like Waylon and Willie in Lukenbach, returned to the basics—the "underlying governing principles"—that cover the relationship.[10]

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[8] *See USAA Texas Lloyds v. Menchaca*, *supra* at *2.

[9] *USAA Texas Lloyds v. Menchaca*, *supra* at *4.

[10] *USAA Texas Lloyds v. Menchaca*, *supra* at *4; *cf.* "Lukenbach, Texas" by Waylon, Willie, and the boys (noting, "Maybe it's time we get back to the basics . . .[.]")

As stated earlier, Menchaca sought only insurance benefits under the policy, court costs, and attorney's fees. After noting that a breach of contract action (the action on the policy) is distinct and independent from claims that an insurer violated extra-contractual common law and statutory duties, the court framed the issue presented as follows:

> [W]hether an insured can recover policy benefits as "actual damages" caused by an insurer's statutory violation absent a finding that the insured had a contractual right to the benefits under the insurance policy.

Seven justices of the Supreme Court answer the question presented this way:

> Generally, the answer to this question is "no," but the issue is complicated and involves several related questions.

See *USAA Texas Lloyds v. Menchaca*, supra at *5.

The court then to announced "five distinct but interrelated rules that govern the relationship between contractual and extra-contractual claims in the insurance context." And without any further ado, here are those rules.

III. RULE NO. 1: THE GENERAL RULE

Rule No. 1: The general rule is that an insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy.

The Supreme Court explained that the rule derives from the fact that the Insurance Code allows an insured only to recover actual damages "caused by" the insurer's statutory violation. *See USAA Texas Lloyds v. Menchaca*, *supra* at *6, *citing inter alia*, *Republic Insurance v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995)(stating as "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"). This general rule was further refined in *Liberty National Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996). In *Menchaca II* the court stated: a more accurate statement of the rule announced in *Stoker* is: "[T]here can be no claim for bad faith [denial of an insured's claim *for policy benefits*] when an insurer has promptly denied a claim that is in fact not covered." *See USAA Texas Lloyds v. Menchaca*, supra at *6, *citing*, *Stoker*, 903 S.W.2d at 341 (emphasis supplied).

The court noted that this general rule applies not only to a "bad-faith denial claim" but also to other types of extra-contractual violations:

- Statutory prompt-payment claim: there can be no liability under the Insurance Code if the insurance claim is not covered by the policy;[11]
- Punitive damage claim: where the insurer did not breach the contract, no basis supports the insured's recovery of punitive damages;[12]
- Insurance Code violation: there is no liability under the Insurance Code if there is no coverage under the policy;[13]
- Failure to effectuate a prompt and fair settlement of claim: no recovery when the insurance policy does not cover the insured's claim for benefits.[14]

The Supreme Court specifically rejected Menchaca's argument that she could recover policy benefits as damages resulting from USAA's statutory violation because that claim "is independent from her claim for policy breach." It

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[11] *See USAA Texas Lloyds v. Menchaca*, *supra* at *6, *citing*, *Progressive Cnty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005).

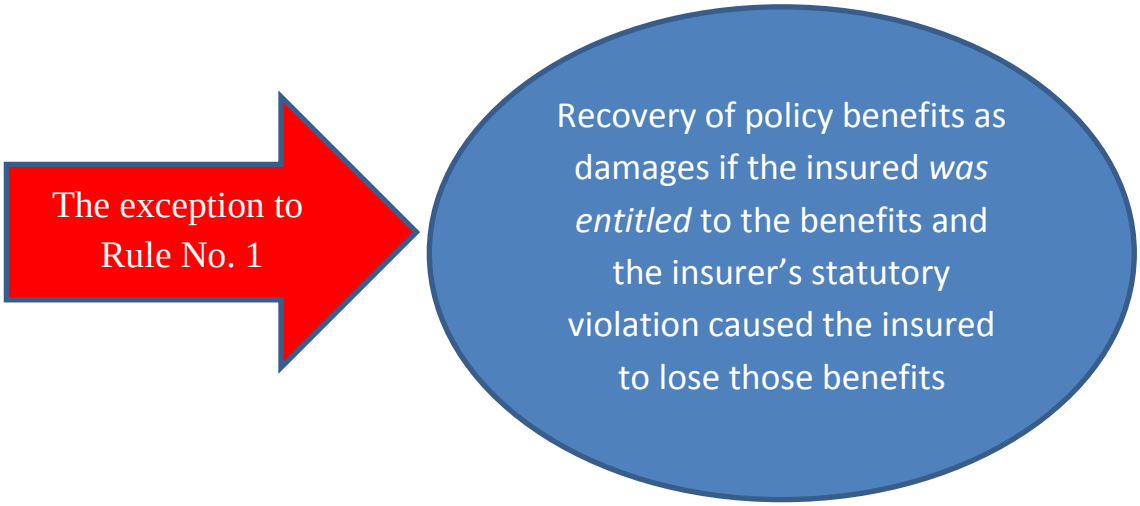
[12] *See USAA Texas Lloyds v. Menchaca*, *supra* at *6, *citing*, *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 253-54 (Tex. 2009)(*per curiam*).

[13] *See USAA Texas Lloyds v. Menchaca*, *supra* at *6, *citing*, *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010).

[14] *See USAA Texas Lloyds v. Menchaca*, *supra* at *6, *citing*, *JAW the Pointe, LLC v. Lexington Insurance Co.*, 460 S.W.3d 597,599-602 (Tex. 2015).

reasoned: "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."[15] The court likewise rejected USAA's contention that "an insured can only recover policy benefits as damages on a breach-of-contract claim and can never recover policy benefits as damages on a statutory-violation claim.[16]

Exception to Rule No. 1: Insurer's Conduct Causes Loss of Policy Benefit



IV. RULE NO. 2: THE ENTITLED-TO-BENEFITS RULE

Rule No. 2: An insured who establishes a right to receive benefits under an insurance policy can recover those benefits as "actual damages" under the statute if the insurer's statutory violation *causes the loss* of the benefits.

The court uses *Vail v. Texas Farm Bureau Mutual Insurance Co.*, 754 S.W.2d 129 (Tex. 1988) as an example of this "logical corollary" to the general rule.[17] In *Vail*, the insureds sued their insurer for common law bad faith and statutory violations—but not for breach of contract. The insured sought to recover the full amount of policy benefits and statutory damages. The jury found that the insurer violated the statute by failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement when liability had become reasonably clear and breached the common law duty of good faith and fair dealing by failing to exercise good faith in the investigation and processing of the claim.[18] The trial court entered judgment for the full amount of policy benefits, treble damages, attorney's fees, and prejudgment interest. The Supreme Court held in *Vail*: "[A]n 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."[19]

The Supreme Court explained that it has not abandoned *Vail* in either *Stoker* or *Castañeda*.[20] Conceding that it "could have made the point more clearly," the court makes it clear that the distinction between the cases is that the

[15] *See USAA Texas Lloyds v. Menchaca*, *supra* at *7.

[16] *See USAA Texas Lloyds v. Menchaca*, *supra* at *8.

[17] *See USAA Texas Lloyds v. Menchaca*, *supra* at *10.

[18] *See id.*, *citing*, *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d at 134.

[19] *Vail v. Texas Farm Bureau Mutual Insurance Co.*, 754 S.W.2d at 136.

[20] *See USAA Texas Lloyds v. Menchaca*, *supra* at *11.

parties in *Vail did not dispute the insured's entitlement to the policy benefits.*[21] Hence, the rule in *Vail* was premised on the fact that the ***policy undisputedly covered the loss*** and ***the insurer wrongfully denied a valid claim***.[22]

The Baby (Sparing You the Labor Pains)

Vail	An insured who establishes a right to benefits under the policy can recover those benefits as actual damages resulting from a statutory violation.
Stoker and *Castañeda*	An insured cannot recover policy benefits as damages for an insurer's extra-contractual violation if the policy does not provide the insured a right to those benefits. (i.e., The parties dispute the insured's entitlement to policy benefits or insured fails to plead and obtains a determination that the insurer was liable for breach-of-contract).

V. RULE NO. 3: THE BENEFITS-LOST RULE

Rule No. 3: An insured can recover benefits as actual damages under the Insurance Code even if the insured has no right to those benefits under the policy, *if the insurer's conduct caused the insured to lose that contractual right.*

The court provided several helpful examples of this rule:

- **Misrepresentation**: Misrepresenting that the insurance policy provides coverage that it does not in fact provide if the insured is "adversely affected" or injured by his or her reliance on the misrepresentation. This constitutes a claim independent of a breach of contract claim. [23]
- **Waiver and Estoppel**: While waiver and estoppel cannot be used to re-write coverage that it did not provide originally, if the insurer's statutory violation prejudices the insured, the insurer may be estopped from denying benefits that would be payable under its policy as if the risk had been covered.[24]
- **Insurer's statutory violation actually causes the policy not to cover a loss that it otherwise would have covered.**[25]

The court summarized the rule this way: "Put simply, an insurer that commits a statutory violation that eliminates or reduces its contractual obligations cannot then avail itself of the general rule."[26]

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[21] *See USAA Texas Lloyds v. Menchaca*, *supra* at *11.

[22] *See id*. at *11; see also, *Provident Am. Ins. Co. v. Castañeda,* 988 S.W.2d 189, 198-20 (Tex.1998)(noting that where insured did not plead and obtain determination that insurer was liable for breach of insurance contract, the insurer's "failure to properly investigate a claim is not a basis for obtaining policy benefits").

[23]*See USAA Texas Lloyds v. Menchaca*, *supra* at *12, *citing*, *Royal Globe Ins. Co. v. Bar Consultants, Inc*., 577 S.W.2d 688, 694 (Tex. 1979).

[24] *See USAA Texas Lloyds v. Menchaca*, supra at *13, *citing*, *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 775 (Tex. 2008).

[25] *See USAA Texas Lloyds v. Menchaca*, *supra* at *13, *citing*, *JAW the Pointe, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597, 602 (Tex. 2015).

[26] *See USAA Texas Lloyds v. Menchaca*, *supra* at *13.

VI. RULE NO. 4: THE INDEPENDENT INJURY RULE

> **Rule No. 4**: There can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered; however, in denying the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim.

There are two aspects to this rule:

(1) An insured can recover actual damages caused by the insurer's bad faith conduct ***if*** the damages are ***separate from and differ*** from benefits under the contract;[27] and
(2) An insurer's statutory violation does not permit the insured to recover *any* damages beyond the policy benefits unless the violation causes an injury that is independent from the loss of benefits.[28]

Of particular interest here is the fact that the Supreme Court noted:

> Our reference in *Stoker* to the "possibility that a statutory violation could cause an independent injury suggested that a successful independent injury claim would be rare, and we in fact have yet to encounter one."[29]

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[27] *See USAA Texas Lloyds v. Menchaca*, *supra* at *14, *citing*, *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995)(explaining that mental anguish could be such an injury) and *Provident Insurance Co. v. Castañeda*, 988 S.W.2d 189, 198 (Tex. 1998)(emphasis supplied). The court stated that such an injury must be "truly independent" of the insured's right to receive policy benefits and "does not apply if the insured's statutory or extra-contractual claims 'are predicated on [the loss] being covered under the insurance policy" or "if the damages 'flow' or 'stem' from the denial of the claim for policy benefits." *See USAA Texas Lloyds v. Menchaca*, *supra* at *15.

[28] *See USAA Texas Lloyds v. Menchaca*, *supra* at *14.

[29] Cormac McCarthy fans may find this observation reminiscent of Westray's (Brad Pitt's) musings on "coincidence" in an exchange with the El Paso lawyer, identified only as "Counselor" (Michael Fassbender) in the movie of the same name:

> Westray: Well, I'm perfectly willing to believe you had nothing to do with this but I'm not the party you have to convince.
>
> Counselor: Convince of what, for Christ sake?
>
> Westray: That this is some sort of coincidence. Because they don't really believe in coincidences. They've heard of them. *They've just never seen one.*

To make the point even more dramatic than McCarthy's dialogue, the Supreme Court ends this section of its opinion with:

> Today, although we reiterate our statement in *Stoker* that such a claim could exist, we have no occasion to speculate what would constitute a recoverable independent injury.

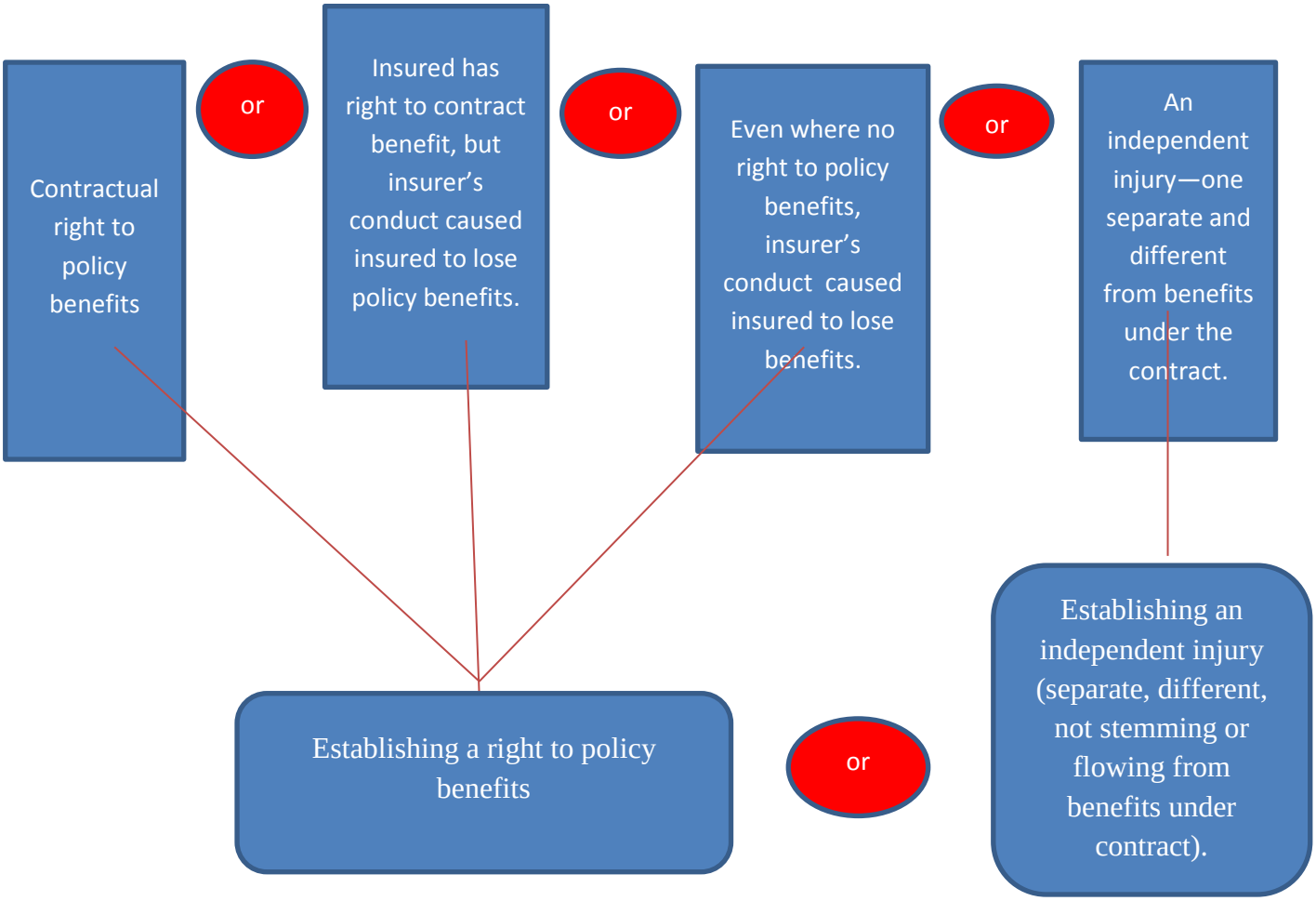
See USAA Texas Lloyds v. Menchaca, *supra* at *15(after "insisting" that an injury is not independent from the insured's right to receive policy benefits if the injury "flows" or "stems" from the denial of policy benefits). It is difficult for me to see how, in light of the specific language of *Menchaca II* that recognizes and articulates a rule that the Texas Supreme Court calls "The Independent Injury Rule," the Fifth circuit can proclaim, *Menchaca* "repudiated the independent injury rule." *See Aldous v. Darwin National Assurance Co*., ___F.3d ___, 2018 WL 2186474 (5th Cir. May 11, 2018). It appears that the court may have confused *Mechaca II's* Rule No. 2 (An insured who establishes a right to receive benefits under an insurance policy can recover those benefits as "actual damages" under the statute if the insurer's statutory violation causes the loss of the benefits) as "repudiating" the "Independent Injury Rule." The express language of *Menchaca II* certainly does not support this reading. Rather, *Parkans International LLC v. Zurich Ins. Co.*, 299 F.3d 514 (5th Cir. 2002)(prior precedent) cited *Castañeda* as authority for the "Independent Injury Rule" as does the Texas Supreme Court. See Note 22, *infra*. The Fifth Circuit may be correct when it states, "*Parkans* ***categorical*** bar does not hold up in the face of *Menchaca*." *See Aldous v. Darwin National Assurance Co*., *supra* at *1 (emphasis supplied). Rule 2 (The Entitled-to- Benefits Rule) does not provide a *categorical* bar to recovery—it simply recognizes that an insured must establish entitlement to policy benefits before recovery of those benefits as actual damages. See Note 22, *infra*.

See USAA Texas Lloyds v. Menchaca, *supra* at *15, *citing*, *Mid-Continent Cas. Co. v. Eland Energy, Inc.*, 709 F.3d 515, 521-22 (5th Cir. 2013)(the Fifth Circuit noted that in 17 years, "no Texas court has yet held that recovery is available for an insurer's extreme acting, causing injury independent of the policy claim") .

VII. RULE NO. 5: THE NO-RECOVERY RULE

> **Rule No. 5**: An insured cannot recover *any* damages based on an insurer's statutory violation unless the insured establishes a right to receive policy benefits under the policy or an injury independent of a right to benefits.

The court calls this rule a "natural corollary" to the first four.[30] So, my read is this: to recover policy benefits as damages for an insurer's statutory violation, an insured must demonstrate the following:



VIII. SUBMITTING THE CLAIM FOR POLICY BENEFITS

The last section of the opinion in which seven of the nine justices of the court join is the final section of part II and deals with how one might submit a case in which "an insured submits both a breach-of-contract and a statutory-violation claim and seeks policy damages for both."[31] The court warns that a proper jury submission must include an appropriate question or instruction to establish that a statutory violation "caused the insured to lose benefits she was

[30] *See USAA Texas Lloyds v. Menchaca*, *supra* at *15.

[31] *See USAA Texas Lloyds v. Menchaca*, *supra* at *15.

otherwise entitled to receive" under the insurance policy.[32] To recover policy benefits on a breach-of-contract claim, the plaintiff-insured must ask the jury "to determine the amount of policy benefits lost" as a result of that breach; to recover on a statutory-violation claim, the plaintiff-insured must ask the jury "to determine the amount of benefits lost as result of the insurer's act or practice that violates the statute."[33]

The rub: "For both claims, the jury must find that the insured was entitled to benefits under the policy."[34] And in this, the court noted, there is the potential for irreconcilable and even fatal conflicts in the jury's answers (as in the case at bar).[35]

Using the instant case as an example, the court offers several possible solutions to this dilemma: omitting Question 1 (the contract question); conditioning a response to Questions 2 (statutory violation) and 3 (damage question) on an affirmative response to Question 1; or instructing the jury that "because Menchaca seeks only to recover benefits under the policy, USAA did not fail to comply with the policy and Menchaca incurred no damages as a result of a statutory violation unless Menchaca was entitled to benefits under the policy."

IX. BIFURCATION (OR EVEN SEVERANCE) OF CONTRACT AND EXTRA-CONTRACTUAL CLAIMS[36]

The intriguing part of this portion of the opinion lies in footnote 25, which is worth placing here in its entirety:

> If the court were to resolve only one of the claims first, whether by summary judgment or by jury verdict, a finding that the insured is or is not entitled to receive policy benefits would necessarily resolve that issue for the remaining claim. *See, e.g.*, *Boyd*, 177 S.W.3d at 921-22 (holding that the trial court's summary judgment in insurer's favor on breach-of-contract claim negated any award on extra-contractual claim predicated on right to benefits under the policy). The fact that both claims require the same finding does not give the insured a right to two bites at the apple.

See USAA Texas Lloyds v. Menchaca, *supra* at n.25.

The clients I defend in first-party uninsured / underinsured motorist (UM / UIM) cases long have enjoyed the benefit of having the contract causes of action severed from the extra-contractual causes.[37] The reason for such a procedural right lies in the "unique nature" of the UM / UIM cause of action: in such cases, there is no right to contract benefits until the insured is "legally entitled" to such benefits under the policy.[38]

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[32] *See USAA Texas Lloyds v. Menchaca*, *supra* at *15.

[33] *See id.* at *16.

[34] *See id.* at *16. As Shakespeare so aptly observed: Ah! There's the rub! *Hamlet* 3:1.

[35] *See USAA Texas Lloyds v. Menchaca, supra* at *16. That is, the jury could answer on one liability theory that the insured was not entitled to any policy benefits (or was paid all benefits to which entitled) and answer on the other liability theory that the insured was entitled to benefits. *See id.* at *16.

[36] As the San Antonio Court of Appeals has explained:

> Severance and bifurcation are distinct trial procedures. *Hall v. City of Austin*, 450 S.W.2d 836, 837–38 (Tex.1970). A severance divides the lawsuit into two or more separate and independent causes. *Id.* However, the bifurcation of a trial leaves the lawsuit intact but enables the court to hear and determine one or more issues without trying all controverted issues at the same time. *Id.* Claims are properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex.1990). "The controlling reasons for a severance are to do justice, avoid prejudice, and further convenience." *Id.*

In re United Fire Lloyds, 327 S.W.3d 250, 254 (Tex. App. 2010)(orig. proceeding).

[37] *See e.g., In re Allstate Cnty. Mut. Ins. Co.*, 447 S.W. 3d 497 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding); *In re Progressive Cnty. Mut. Ins. Co.*, 439 S.W.3d 422 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding); *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding); *State Farm Mut. Auto. Ins. Co. v. Wilborn*, 835 S.W.2d 260 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

[38] *See Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006)("The UIM contract is unique because, according to its terms, benefits are conditioned upon the insured's legal entitlement to receive damages from a third party. Unlike many first-party insurance contracts, in which the policy alone dictates coverage, UIM insurance utilizes tort law to determine coverage.")

A claim for policy benefits under a homeowner's policy for property damage to a dwelling is not so "unique" and as a consequence is not necessarily entitled to a similar procedural safeguard.[39] But as the Supreme Court explained in *Liberty Mutual Fire Ins. Co. v. Akin*, a property damage suit against a homeowner's insurer may provide the opportunity for a severance of the contract claim from the extra-contractual claim when the insurer has made a settlement offer on the disputed portion of the contract claim.[40] *Akin* was a mandamus proceeding. The plaintiff argued that a water leak caused foundation settlement damage to his home. The insurer paid a portion of the loss that it did not dispute and reserved $18,000 for the disputed claim. It did not make a settlement offer on the disputed portion of the claim.

The insurer argued that it intended to offer evidence of its reserve to rebut plaintiff's theory that the insurer was "determined" to deny the claim and argued that the jury would misinterpret such evidence. In denying Liberty Mutual's request for a mandamus requiring a severance of the contract and extra-contractual claims, the court stated:

> A severance may nevertheless be necessary in some bad faith cases. A trial court will undoubtedly confront instances in which evidence admissible only on the bad faith claim would prejudice the insurer to such an extent that a fair trial on the contract claim would become unlikely. **One example would be when the insurer has made a settlement offer on the disputed contract claim.** *See Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 4 (Tex.1986) (holding that settlement offers are inadmissible to prove or disprove liability on a claim). As we have noted, some courts have concluded that the insurer would be unfairly prejudiced by having to defend the contract claim at the same time and before the same jury that would consider evidence that the insurer had offered to settle the entire dispute. *See, e.g., Lerner*, 901 S.W.2d at 753; Northwestern Nat'l, 862 S.W.2d at 46; *F.A. Richard*, 856 S.W.2d at 767; *United States Fire Ins. Co*., 847 S.W.2d at 673; *Wilborn*, 835 S.W.2d at 262. While we concur with these decisions, we hasten to add that evidence of this sort simply does not exist in this case. **In the absence of a settlement offer on the entire contract claim, or other compelling circumstances, severance is not required.** *Allstate Ins. Co. v. Hunter*, 865 S.W.2d 189, 194 (Tex.App.—Corpus Christi 1993, orig. proceeding); *Progressive County Mut. Ins. Co. v. Parks*, 856 S.W.2d 776, 777 (Tex.App.—El Paso 1993, orig. proceeding).

Liberty Nat. Fire Ins. Co. v. Akin, 927 S.W.2d 627, 630 (Tex. 1996)(emphasis supplied).

> **Query**: **In those cases in which insured seeks to recover policy benefits as actual damages and pursues both contractual and extra-contractual theories seeking such benefits, will the insurer be entitled to a severance (under *Akin* if there is a settlement offer on the disputed portion of the claim) or bifurcation (under *Menchaca II's* footnote 25)?**
>
> **Answer**: **Perhaps.**[41]

X. CONCLUSION

The court delivered *Menchaca II* only a few months ago (it does not even have a Southwest Reporter citation yet!) and only a few courts have had the opportunity to apply it. I hope that this summary and analysis will be of some assistance to the practitioner.

[39] *See Liberty Mut. Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1997) (orig. proceeding).

[40] *See id.* at 630.

[41] So you're telling me there's a chance. . . Yeah!