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SUPREME COURT OF TEXAS
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No. 14-0721

In the Supreme Court of Texas

USAA TEXAS LLOYDS COMPANY,

Petitioner,

v.

GAIL MENCHACA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* INSURANCE COUNCIL OF TEXAS

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Amicus Curiae Insurance Council of Texas ("ICT") submits this brief in support of the position of Petitioner USAA Texas Lloyds Company ("USAA").

Interest of Amicus

ICT is a non-profit trade association representing the interests of over 500 property and casualty member insurers doing business in Texas. ICT member companies write over 90% of the homeowners' premium in Texas and handle thousands of claims for benefits after a wind or hail storm. Wind and hail losses usually average 50% of the homeowners' premium collected.[1] In 2015, the direct written premium for homeowners' policies was over $7.9 billion dollars. In addition, Texas insurers paid approximately $3.7 billion dollars in losses for homeowners' claims in 2015.

Texas has more weather-related events, including hail storms, than any other state. Between 2004 and 2013, hail-related damages alone cost the Texas marketplace $10.4 billion. According to the most recent data for 2014, Texas was second in the nation in the number of major hail events. Other weather events, such as tornadoes, further contribute to weather-related losses. In 2015, Texas had 240 tornadoes – the largest number since recordkeeping began in 1950. ICT

[1] Based on the formula for computing the participation of insurance companies in the Texas Windstorm Insurance Association ("TWIA"), contained in 28 Texas Administrative Code §5.4001(c)(2)(B)(i).

member insurers are thus directly and significantly affected by the rising number of cases filed after wind and hail events.

This case exemplifies a disturbing growing trend in the volume and character of lawsuits filed after a catastrophic weather event: the baseless efforts of plaintiffs' lawyers to recover policy benefits as "bad faith" damages after the contract claim has been resolved through judgment or appraisal.[2] Because these efforts are fueled by uncertainty in Texas law, ICT asks the Court to clarify the independent injury requirement for extra-contractual causes of action. Certainty in Texas law will assist not only in the handling of claims but also in pricing policies, which is largely determined by loss payment rates. The decision in this case affects not just homeowners' insurance, but claims and rates for other first-party policies, such as farm and ranch, dwelling, commercial property, and other coverages that provide insurance against loss of property.

ICT 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

[2] *See, e.g.*, *Fregoso v. State Farm Lloyds*, No. 7:14-CV-530, 2016 WL 1170104, at *7 (S.D. Tex. March 24, 2016) (cautioning plaintiffs' counsel under threat of sanctions that the case "like many storm related breach of contract cases" filed by the firm "is factually unsupported"); *Dizdar v. State Farm Lloyds*, No. 7:14-CV-563, 2016 WL 1449248, *7 (S.D. Tex. April 13, 2016) (same, and setting Rule 11 sanctions hearing for plaintiffs' counsel).

this brief. No person other than the amicus curiae, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

Summary of Argument

Extra-contractual causes of action are, by definition, beyond, outside, or in addition to the breach-of-contract action whose damages are measured by the benefits paid or payable under the policy of insurance. The court of appeals ignored this distinction by allowing Menchaca to use contractual policy benefits as a measure of damages for an alleged tort that is outside of the parties' contractual obligations – despite the jury's findings that USAA did not breach those obligations.

Extra-contractual "bad faith" is not an alternate route to the recovery of contractual policy benefits. The Court should clarify that an independent injury is required to support causes of action that involve duties beyond the parties' contractual agreement and that policy benefits can never constitute a measure of damages when the fact-finder specifically determines that no breach of the policy occurred. Reaffirming the structure of graduated liability articulated in *Moriel* will bring a measure of certainty that is currently lacking but needed in Texas bad-faith jurisprudence.

Argument

I. Extra-contractual bad faith is actionable only if it causes an independent injury. The Court should overturn or correct any contrary suggestion in *Vail*.

Shortly after recognizing in *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165 (Tex. 1987), that insurers have a common-law duty of good faith and fair dealing in the settlement and handling of claims, the Court added contours to the new tort in *Vail v. Texas Farm Bureau Mutual Ins. Co.*, 754 S.W.2d 129 (Tex. 1988).[3] Now, almost 30 years later, the following statements from *Vail* continue to animate first-party insurance litigation:

> We hold 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. The Vails suffered a *loss* at the time of the fire for which they were entitled to make a claim under the insurance policy. It was not until Texas Farm wrongfully denied the claim that the Vails' loss was transformed into a legal *damage.* That damage is, at minimum, the amount of policy proceeds wrongfully withheld by Texas Farm.

Id. at 136 (internal citations omitted). Most federal and intermediate state appellate courts treat *Vail* as implicitly modified or superseded by the Court's subsequent holdings that the extra-contractual tort of bad faith is actionable only if

[3] *Vail* also recognized the congruent standards for breach of the common-law duty of good faith and fair dealing and violation of statutory duties under the Texas Consumer Protection-Deceptive Trade Practices Act ("DTPA") and Texas Insurance Code for failure to pay when liability is reasonably clear. *See Vail*, 754 S.W.2d at 135; *see also Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) ("the common-law bad-faith standard is the same as the statutory standard").

it is supported by an independent injury. *See, e.g.*, Transportation Insurance Co. v. Moriel, 879 S.W.2d 10, 17 (Tex. 1994); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995); *Twin City Fire Insurance Co. v. Davis*, 904 S.W.2d 663, 665-66 (Tex. 1995); *Provident American Insurance Co. v. Castañeda*, 988 S.W.2d 189, 199 (Tex. 1998).[4] However, the dispute in this case and the recently certified question from the U.S. Court of Appeals for the Fifth Circuit[5] demonstrate that the uncertainty seeded by *Vail* remains. ICT requests that the Court remove this uncertainty by renouncing these statements in *Vail* and unifying the "independent-injury rule" for extra-contractual tort causes of action.

A. Extra-contractual causes of action are separate from a cause of action for breach of contract and must be supported by independent injuries.

Despite *Vail*'s holding that policy proceeds constitute a minimum measure of damages for an insurer's bad-faith failure to pay, the Court has since steadily

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[4] *See, e.g.*, Great American Insurance Co. v. AFS/IBEX Financial Services, Inc., 612 F.3d 800, 808 & n.1 (5th Cir. 2010); *Parkans Int'l LLC v. Zurich Ins. Co.*, 299 F.3d 514, 519 (5th Cir. 2002); *United Servs. Auto. Ass'n v. Gordon*, 103 S.W.3d 436, 442 (Tex. App San Antonio 2002, pet. denied); *Charla G. Aldous PC v. Lugo*, No. 3:13-CV-3310-L, 2014 WL 5879216, at *5 (N.D. Tex. Nov. 12, 2014); *cf.* Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 77 S.W.3d 253, 264 (Tex. 2002) ("Rocor seeks to recover its defense costs not as a measure of contractual damages, but as tort damages for National Union's alleged delay in settling the case once it assumed control of the settlement negotiations."); *but see* United Nat. Ins. Co. v. AMJ Investments, LLC, 447 S.W.3d 1, 11 (Tex. App.–Houston [14th Dist.] 2014, pet. dism'd).

[5] *See* In re Deepwater Horizon, 807 F.3d 689 (5th Cir. 2015), *certified question accepted*, No. 15-0891 (Tex. Dec. 4, 2015). Even though this case has settled, the uncertainty is evidenced by the Fifth Circuit's certification.

distanced itself from the suggestion that extra-contractual causes of action are a surrogate for breach of contract or that their damages overlap:

> A bad faith case can potentially result in three types of damages: (1) benefit of the bargain damages for an *accompanying* breach of contract claim, (2) compensatory damages for the tort of bad faith, and (3) punitive damages for intentional, malicious, fraudulent, or grossly negligent conduct. It is important to preserve distinct legal boundaries between the three bases of recovery to prevent arbitrariness and confusion at the critical thresholds. . . . *An insurer's nonpayment of a covered claim ordinarily is a breach of contract, and does not alone entitle a plaintiff to mental anguish or exemplary damages*.

Moriel, 879 S.W.2d at 17 (emphasis added and internal citations omitted) (citing *Lyons v. Millers Casualty Ins. Co.*, 866 S.W.2d 597, 600 (Tex. 1993) ("This focus on evidence and its relation to the elements of bad faith is necessary to maintain a distinction between a contract claim on the policy, and a claim of bad faith delay or denial."); *Dean v. Dean*, 837 F.2d 1267 (5th Cir.1988); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex.1986)). *Moriel* clarified that while breach of contract must accompany and form the predicate for the tort of bad faith, the damages recoverable for the causes of action are distinct.

Castañeda applied *Moriel*'s paradigm of delineated liability thresholds to facts mirroring those here. In that case, the insured, Denise Castañeda, sued her carrier, Provident American, for violations of the Insurance Code and the DTPA, but not for breach of contract, after her claim for health benefits was denied based

on a policy exclusion. *Castañeda*, 988 S.W.2d at 192. The jury found for Castañeda on the statutory claims, awarding her $50,000 for loss of benefits under the policy[6] and harm to her credit reputation. In reversing the court of appeals' affirmance of the judgment in favor of Castañeda, the Court held that Castañeda was not entitled to recover policy benefits for Provident American's faulty investigation of her claim or other claim-handling errors because "none of the actions or inactions of Provident American was the producing cause of any damage separate and apart from those that would have resulted from a wrongful denial of the claim . . . ." *Id.* at 198;[7] *see also* *Stoker*, 903 S.W.2d at 342 (Spector, J., concurring) (noting that manner of investigation did not proximately cause the damages insured argued were covered under the policy). Even though the Court assumed that Castañeda's claim was covered, the policy benefits were recoverable as damages only for breach of contract; the extra-contractual causes of action had to be supported by damages that were "*other than* policy benefits or damages flowing from the denial of the claim." *Id.* (emphasis added).

As in *Castañeda*, the jury awarded Menchaca policy benefits, not damages from an independent injury she suffered, after finding an extra-contractual

[6] The charge defined "loss of benefits" as "the amount of benefits due under the policy." *Provident Am. Ins. Co. v. Castañeda*, 914 S.W.2d 273, 281 (Tex. App.—El Paso 1996), *rev'd*, 988 S.W.2d 189 (Tex. 1998).

[7] Because the loss of credit reputation stemmed from the denial of benefits, Castañeda could not recover those damages either. *Id.* at 199.

statutory violation of failure to adequately investigate. But the jury also found that USAA did not breach the contract, leaving the same foundational void for extra-contractual liability that existed in *Castañeda*. No insurer causes the loss of policy benefits unless it breaches the insurance contract. If insureds can recover those benefits as damages for extra-contractual claims – which are supposed to remedy independent injuries caused by exceptionally egregious insurer misconduct – the causal chain between cause of action and damages is broken, resulting in the arbitrariness and confusion the Court abjured in *Moriel.* The independent-injury rule is a bulwark against the forces seeking to obfuscate the delineations between damages that arise from breach of contractual obligations and those that arise from an "extra" tortious act.

Explicitly overturning *Vail*'s holding that policy benefits comprise a minimum measure of damages for extra-contractual bad faith and confirming the independent-injury rule would be consistent with the Court's evolving views of bad faith. *Arnold* held that the statute of limitations on the common-law cause of action would not begin to run until the contract claim was resolved; three years later, the Court modified that holding, "because in retrospect it cannot withstand critical scrutiny," so that accrual of the cause of action coincided with the denial of coverage. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 829 (Tex. 1990). In 2012, the Court abolished the application of common-law and statutory causes

of action for bad-faith claim handling it had extended to workers' compensation claims in 1988. *Texas Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 446-51 (Tex. 2012) (overruling *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210 (Tex.1988)). As the Court itself has noted, *Vail* was an early opinion that "followed closely after" *Arnold*'s recognition of the tort. *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 149 (Tex. 1994). Solidifying the independent-injury rule to bring *Vail* in line with Court's subsequent holdings in *Moriel*, *Davis*, *Stoker*, and *Castañeda* is a natural step in the refinement of the Court's bad-faith jurisprudence.

B. The structure of the Texas Insurance Code supports the separation of contractual and extra-contractual injuries and remedies.

In *Arnold*, the Court expressed concern that "unscrupulous insurers" might "arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed" without a cause of action for bad faith. *Arnold*, 725 S.W.2d at 167. The Court did not hold that policy benefits were an appropriate measure of damages for the new tort. To the contrary, the Court implied that damages for the new tort would be independent of the contractual recovery by making them subject to the "principles allowing recovery of those damages in other tort actions." *Arnold*, 725 S.W.2d at 168. As discussed *supra*, the Court also held that the statute of limitations on the new tort would not begin to run until "the

underlying insurance claims are finally resolved" – further evidence that, from the tort's inception, the Court considered breach of contract to be a predicate for bad-faith liability but the new tort and its remedies to be distinct from the recovery of policy benefits.[8]

Four years after *Arnold*, the Texas Legislature amended the Texas Insurance Code to increase the penalties on first-party claims that are not promptly paid. *See* Act of June 6, 1991, 72d Leg., R.S., ch. 242, § 11.03, 1991 Tex. Gen. Laws 939, 1043-45 (former Texas Insurance Code art. 21.55); *see also* *Mid-Century Ins. Co. of Texas v. Barclay*, 880 S.W.2d 807, 810 (Tex. App.–Austin 1994, writ denied).[9] Because these penalties are tied to the carrier's breach of contract and not to proof of the carrier's bad faith,[10] they support the structure of graduated liability

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[8] Although the Court later overturned this holding in *Murray*, *Arnold* confirms the Court's conceptualization of the tort as an addition to the cause of action for breach of contract. In fact, four justices dissented in *Murray* for essentially this reason. *Murray*, 800 S.W.2d at 831 (Spears, J., dissenting) ("Limitations should begin to run when the insured's underlying contract claim is finally resolved rather than when the claim is initially wrongfully denied. . . . It is not the mere denial of a claim that gives rise to a bad faith cause of action; it must be a denial without a reasonable basis.").

[9] These prompt-payment provisions are recodified in Chapter 542, subchapter B, of the current Insurance Code.

[10] *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 461 (5th Cir. 1997) ("good faith assertion of defense does not relieve the insurer of liability for penalties for tardy payment, as long as the insurer is finally judged liable"). The court of appeals in this case held that Menchaca was not entitled to prompt-payment penalties because USAA did not breach the policy. *USAA Texas Lloyd's Co. v. Menchaca*, No. 13-13-00046-CV, 2014 WL 3804602, at *10 (Tex. App.–Corpus Christi July 31, 2014, pet. filed).

articulated in *Moriel* by punishing a breach of contract that does not cause independent injury. The prompt-payment statute thus provides a potent deterrent to wrongful denials or delays of payment, while maintaining the critical distinction between damages that flow from breach of the contractual promise to pay and the separate compensatory damages that must be established for bad-faith liability.

Vail pre-dates the enhanced prompt-payment penalties and the demarcation of the contractual/extra-contractual threshold in *Moriel*. To the extent *Vail* sought to remedy a perceived injustice by allowing contract benefits to serve as the measure of tort damages and provide the insured access to the enhanced damages provisions of the Insurance Code and DTPA, that conflation of actions and remedies is no longer necessary or appropriate. The Court should overturn or modify the statements in *Vail* to bring them in line with the Court's subsequent decisions requiring an independent injury for bad-faith causes of action.

C. Allowing contractual policy benefits to serve as the measure of damages for extra-contractual "bad faith" inflates the cost of insurance claims and premiums.

The failure to maintain a distinction between the benefit-of-the-bargain policy benefits recoverable for breach-of-contract claims and the compensatory damages recoverable for the separate tort of bad faith has led to an inflation in the amount and value of insurance claims and litigation in Texas. *See generally* Mark J. Browne, Ellen S. Pryor & Bob Puelz, *The Effect of Bad Faith Laws on First-*

Party Insurance Claims Decisions, 33 J. LEGAL STUD. 355, 355-56, 366-68 (2004) (finding "positive correlation" between existence of bad-faith remedy and number of litigated claims and settlement payments); Sharon Tennyson & William J. Warfel, *The Law and Economics of First-Party Insurance Bad Faith Liability*, 16 Conn. Ins. L.J. 203, 206-07 (2009) ("[T]he tort of bad faith increases both the potential damages and the uncertainty of judgments for insurance companies. Thus, the legal basis for a first-party insurance bad faith allegation determines the realistic potential for a punitive damages award, dramatically altering the 'stakes' of first-party insurance bad faith litigation."); *see also* Amicus Letter Brief of Texans for Lawsuit Reform. Insureds plead extra-contractual causes of action as a matter of course in virtually all first-party insurance cases, in part because *Vail* has led to the misperception that contract benefits alone suffice as a basis to recover treble damages under the Insurance Code and DTPA.

Enterprising plaintiffs' counsel further exploit the uncertainty in the standards and application of extra-contractual actions to leverage large settlements that bear little relation to the actual value of the insurance claims themselves, which insurers in turn are forced to write off as a cost of doing business:

> [A] lack of rational boundaries in bad-faith law harms all consumers. Permitting extra-contractual damages awards in cases that should not appropriately be settled does not serve a useful purpose. It provides a windfall recovery to claimants based on events such as human error or reasonable miscalculation, and appeals to the biases that juries

> maintain against insurers. In the end, the insurance consumer pays these superfluous costs. Insurers internalize the systemic risks of bad-faith litigation and raise premiums accordingly. Because this happens, in part, on an industry-wide level, the increase in cost occurs independent of a specific insurer's risks of bad-faith litigation and does not distinguish the truly "bad" insurers from those who are trying, admittedly without perfection, to be responsible.

Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. R. 1477, 1529 (2009). Inflated claim, litigation, and settlement costs affect consumers not only through higher private insurance premiums, but also through increased taxes that support state-created insurers of last resort. *See* Texans for Lawsuit Reform, *The TWIA Problem: Why You Should Care* (https://www.tortreform.com/reports/twia-problem-why-you-should-care); *see also* Chad G. Marzen, *Public Policy Considerations Concerning Insurance Bad Faith and Residual Market Mechanisms*, 66 Baylor L. Rev. 388, 410-15, 420-25 (2014).

Public policy favors a more principled application of bad faith standards, which the Court can advance by enforcing an independent-injury rule that distinguishes economic contract damages from the compensatory and exemplary damages caused by truly egregious conduct. This structure is already reflected in the statutes governing the prompt-payment of claims, unfair claim-handling and settlement practices, and standards for the recovery of exemplary damages. "Bad

faith" is not breach of contract or even negligence committed in connection with a breach; the damages must reflect the exceptional nature of the tort.

II. In the alternative, to the extent *Vail* remains valid and does not require independent injury, the Court should limit *Vail*'s holding to a carrier's failure to pay when liability is reasonably clear; policy benefits should serve as an element of damages only for bad faith premised on a carrier's breach of its contractual duty to pay.

If the Court decides not to abrogate or overturn *Vail* on the issue of independent injury, the Court should restrict *Vail* to cases involving only a carrier's failure to pay policy benefits when liability is reasonably clear, with breach of contract a predicate for recovery. This limitation would comport with general "contort" principles that allow contractual economic damages to serve as the measure of damages for an accompanying tort only when the independent tort is so closely aligned with performance of the contract that the tort induces loss of the contract's benefit. *See* *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 46-49 (Tex. 1998) (damages for fraudulent inducement measured by damages for economic losses related to the subject matter and performance of the parties' contract). This was the situation in *Vail*: Texas Farm Bureau refused to pay the insureds' claim after its liability had become reasonably clear; because the insureds "[sought] recovery on the policy" in addition to seeking statutory damages under the Insurance Code and DTPA, the

Court held that the "policy benefits wrongfully withheld" constituted an appropriate measure of damages. 754 S.W.2d at 131.

The same is not true here. The jury specifically found that USAA did not breach the policy and further found that USAA did not fail to pay when its liability had become reasonably clear. See USAA's Brief on the Merits, Appx. 2. The jury's finding that USAA failed to conduct a reasonable investigation could not have caused the wrongful withholding of policy benefits; otherwise, the jury would have answered the breach-of-contract question in the affirmative. If the tort is not committed in conjunction with a breach of contract and does not cause the loss of policy benefits, the independent-injury rule requires the plaintiff to prove the damages proximately and specifically caused by the tort. Menchaca did not. As this Court held in both *Castañeda* and *Stoker*, a failure to properly investigate alone can never cause loss of policy benefits; even under *Vail*, a plaintiff must establish a nexus of proximate cause between the tortious act and contract damages if the plaintiff seeks to use those damages as a measure of legal harm.

The Court's opinions in *Davis* and *Simmons* further illustrate the point. In *Davis*, the Court noted that some acts of bad faith, "such as a failure to properly investigate a claim or an unjustifiable delay in processing a claim, *do not necessarily relate* to the insurer's breach of contractual duties to pay" and "may give rise to different damages." *Davis*, 904 S.W.2d at 666 n.3 (emphasis added).

An inadequate investigation that leads to the insurer's denial of the claim is subsumed in the carrier's breach of contract or failure to pay when liability is reasonably clear and will be accompanied by damages for breach of contract. *Compare Castañeda*, 988 S.W.2d at 198 (failure to adopt reasonable investigation standards did not cause "any damage separate and apart from those that would have resulted from a wrongful denial of the claim") *with State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998) (carrier breached contract and its duty of good faith and fair dealing by denying the claim "based upon a biased investigation intended to construct a pretextual basis for denial"). If the inadequate investigation does not produce denial of the claim, it is actionable as bad faith only if it causes an independent injury – the chimerical "extreme act" to which *Stoker* alludes. *See Mid-Continent Cas. Co. v. Eland Energy, Inc.*, 795 F. Supp. 2d 493, 510 (N.D. Tex. 2011), *aff'd,* 709 F.3d 515 (5th Cir. 2013) (collecting cases characterizing *Stoker* as leaving open the "theoretical possibility" that bad-faith liability could exist for insurer's "extreme act" in absence of contractual liability).

Stated conversely, if the plaintiff cannot establish an independent injury arising from an "extreme act" by the carrier in handling the claim, breach of contract is the necessary contractual component of an extra-contractual cause of action. As Justice Hecht noted in his concurrence in *Viles* – foreshadowing, *inter*

alia, the Court's holdings in *Moriel*, *Stoker*, *Akin*,[11] and *Castañeda* – the suggestion that extra-contractual bad-faith actions can exist absent breach of contract is dubious. *Viles v. Security Nat. Ins. Co.*, 788 S.W.2d 566, 568 (Tex. 1990) (Hecht, J., concurring) ("This holding suggests, at least, that a breach of the duty of good faith and fair dealing may occur even when there has been no breach of contract. The Court cites no authority for this statement."). With limited exceptions, extra-contractual causes of action for unfair settlement and claim-handling are tethered to the breach of contract for failure to pay, which forms an element of the tort. *See id.* at 569 ("The concurring opinion in *Arnold* stated that a breach of contract was an element of a cause of action for breach of the duty of good faith and fair dealing." (citing *Arnold*, 725 S.W.2d at 168 (Gonzalez, J., concurring)).

By allowing policy benefits to serve as the measure of damages for an alleged tort without an accompanying breach of contract, the court of appeals ignored the independent-injury rule and misapplied even the most expansive reading of *Vail*. The jury in *Vail* found a predicate breach of contract; the carrier committed bad faith by wrongfully withholding those benefits when its contractual liability was reasonably clear. Even if policy benefits comprise a measure of extra-

[11] "[I]n most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract." *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996).

contractual damages when the tort leads to the breach of contract, a jury's finding that the carrier did not breach the contract necessarily precludes the award of those damages. *See* Progressive Cty. Mut. Ins. Co. v. Boyd, 177 S.W.3d 919, 922 (Tex. 2005). This Court has never held otherwise and should not do so now.

Conclusion

To be actionable, extra-contractual causes of action must cause extra-contractual damages, i.e. damages other than the loss of policy benefits. Distinguishing benefit-of-the-bargain damages recoverable for breach of contract from the damages recoverable for an independent injury caused by the tort of bad faith reinforces the extraordinary nature of the misconduct necessitating a remedy. By failing to enforce the distinction and allowing insureds to substitute policy benefits for independent bad-faith damages, courts have obfuscated the meaning of the tort and the wrong it is meant to address. Bad faith is not negligence. The Court should overturn or limit *Vail* and clarify the independent-injury rule to address the "we-know-it-when-we-see-it approach" some courts continue to employ that "does little to change the lottery-like nature of the bad faith cause of action" and damages. *Simmons*, 963 S.W.2d at 50 (Hecht, J., dissenting).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Brief of Amicus Curiae Insurance Council of Texas was electronically filed with the Clerk of the Court using the eFile.TxCourts.gov filing system which will send notification to the attorneys of record in this case.

/s/ Catherine L. Hanna
Catherine L. Hanna

CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word 2010 and contains 4,581 words, as determined by the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

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Dated: April 29, 2016