Spring 2021

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Colorado • Utah • Wyoming • Texas

IN BRIEF

COLORADO

- The Tenth Circuit Court of Appeals held that a "rockfall" was within the meaning of "landslide" or "other earth movement" for determining applicability of earth-movement exclusion in homeowner's insurance policy.

.....*Page 2*

UTAH

- The Utah Court of Appeals held as a matter of first impression that a plaintiff asserting product defect claims based on a defective vehicle restraint system must establish causation of alleged enhanced injuries through expert testimony.

.....*Page 2*

WYOMING

- Summary judgment granted for employer because employee's assault was outside course and scope of employment, and direct negligence claims against employer fail for lack of duty of care.

.....*Page 3*

TEXAS

- Texas Supreme Court held that an insurer's acceptance and partial payment of a claim within TPPCA's statutory deadline, and timely payment of a subsequent appraisal award, does not absolve it of liability for statutory interest and attorneys' fees for amounts owed but unpaid at expiration of the initial statutory deadline.

.....*Page 4*

COLORADO

DEWHIRST & DOLVEN OBTAINS DEFENSE VERDICT IN RARE CIVIL JURY TRIAL DURING PANDEMIC

Larimer County: Attorneys Miles Dewhirst and Steven Helling of Dewhirst & Dolven tried an eight-day jury trial in February, while following COVID precautions which included masks to be worn at all times (except when a witness was on the stand testifying behind a plastic barrier), social distancing within the courtroom, and each morning taking everyone's temperature and questioning them about possible COVID exposure and any symptoms. Counsel had to remain seated at tables throughout trial except for opening statements and closing arguments. Witnesses testified via Webex and also in-person.

Miles Dewhirst and Steven Helling obtained a defense verdict in this case where Plaintiff sought $6 million in damages, as a result of injuries he claimed were caused by Defendant's improper lane change which pushed Plaintiff off the Interstate.

The accident occurred on I-25 when 48 year old Plaintiff Mark Dunlap's SUV collided with Defendant Split Shot Hauling, LLC's semi-truck hauling a 45-foot belly dump trailer. Plaintiff alleged that he had been traveling in the left lane and was attempting to pass the Split Shot truck traveling in the right lane, when Defendant made an improper lane change, causing the trailer to collide with Plaintiff's SUV. Plaintiff's vehicle was then sent down the embankment, across the grassy median at high speed, and into the oncoming lanes of traffic before Plaintiff steered it back into the median, where it came to rest. Colorado State Patrol cited Defendant's driver for an improper lane change.

At trial, Defendant maintained that Plaintiff had been driving in the right lane at 79 mph behind Defendant's truck, and that as Defendant began to change lanes into the left lane, Plaintiff also changed lanes and accelerated in an attempt to pass before realizing that he would be unable to complete his pass, at which point Plaintiff braked, causing his SUV to collide with Defendant's trailer.

Plaintiff sued for negligence, asserting a vicarious liability claim against Split Shot, and claiming injuries including mild traumatic brain injury, and neck, back, and spinal injuries. Plaintiff sought

Continued on Page 2

IN THIS ISSUE

Continued from Page 1

damages totaling $6 million, including approximately $300,000 for future medical expenses (Plaintiff did not seek to recover past medical expenses at trial), $61,800 in past lost wages and $546,000 in future lost earnings, plus damages for emotional distress and physical impairment. Before trial, Plaintiff agreed if Defendant offered the $1 million policy limit, he would consider it. Defendant initially offered to settle for $100,000, and later made a statutory settlement offer of $175,000.

At trial, the Defendant disputed liability and damages. Defendant's driver testified that before changing lanes he signaled and saw in his mirror that the left lane was empty for half a mile back. Plaintiff's testimony that he had been in the left lane for some time, was belied by two medical records documenting Plaintiff's admission that he had changed lanes right before attempting to pass Defendant's semi. Defendant's accident reconstruction expert opined that Plaintiff had the last clear chance to avoid the accident and Plaintiff's aggressive driving caused the accident. The jury returned a verdict for the defense, finding that Defendant's driver was not negligent and did not cause Plaintiff's injuries and damages.

Mark Dunlap v. Split Shot Hauling, LLC and Kirk Smith, Case No. 2018 CV 117.

ROCKFALL IS "LANDSLIDE" OR "OTHER EARTH MOVEMENT" WITHIN HOMEOWNER POLICY'S EARTH-MOVEMENT EXCLUSION

Tenth Circuit: Plaintiffs/Insureds Dustin Sullivan and Nana Naisbitt asserted claims for breach of contract, insurance bad faith, statutory damages for insurance bad faith, and declaratory judgment regarding coverage against their homeowners insurer, Defendant Nationwide, after Nationwide denied coverage for damage to Plaintiffs' house caused when multiple large boulders dislodged from a rocky outcropping and rolled down a steep hillside, coming to rest in Plaintiffs' yard or striking their house.

Nationwide's claims investigation included an engineering report, which found that the boulders dislodged "accidentally and were not influenced by meteorological conditions such as torrential rain or high winds." The investigation also included a geological report that observed the existence of rockfall hazards at Plaintiffs' property primarily due to an undercut sandstone outcrop, as evidenced by the fact the property was scattered with numerous rocks from both recent and more remote rockfall events.

Nationwide denied coverage under an exclusion in Plaintiffs' homeowners policy which provided that Nationwide does "not insure for loss caused directly or indirectly by … Earth Movement" and regardless of "whether or not the loss event results in widespread damage or affects a substantial area." The policy's definition of "Earth Movement" includes, among other phenomena, a "landslide" or "any other earth movement including earth sinking, rising or shifting … caused by or resulting from human or animal forces or any act of nature…."

Nationwide moved for summary judgment, and Plaintiffs' response included their own geological report opining that a "rockfall" is distinctly different from a "landslide," and that the term "earth" means soil, not in-situ rock. However, Plaintiffs' geological report also quoted various sources suggesting that rockfall is a type of landslide. Plaintiffs moved to certify to the Colorado Supreme Court as a matter of first impression under Colorado law the question of whether the earth-movement exclusion bars coverage for direct physical loss caused by a rockfall. The district court denied the motion to certify and granted summary judgment in Nationwide's favor, concluding that the earth-movement exclusion barred coverage.

Plaintiffs appealed to the Tenth Circuit, asking the Court to certify to the Colorado Supreme Court five questions of law related to the earth-movement exclusion. The Court declined to do so and denied the motion to certify because there was a "reasonably clear and principled course" for the Court to follow without troubling the state court.

Reviewing de novo the district court's grant of summary judgment, the Court noted that under Colorado law, insurance policies must be interpreted and given effect according to the "plain and ordinary meaning of their terms," avoiding "technical readings" and instead looking to "what meaning a person of ordinary intelligence would attach to" a policy term.

The Court discussed authority from several jurisdictions that concluded earth-movement exclusions include rockfall, cited dictionary (rather than technical) definitions of "landslide" to include rockfall, and noted that an ordinary reasonable person would understand "earth" to include not only soil, but also rock and generally all natural materials that comprise the surface of the earth. The Court therefore predicted that the Colorado Supreme Court would find such authority persuasive and would find the earth-movement exclusion at issue unambiguously barred coverage for the damage to Plaintiffs' house. The Tenth Circuit accordingly affirmed the district court's grant of summary judgment in Nationwide's favor.

Sullivan v. Nationwide Affinity Ins. Co. of Am., ___ Fed.Appx. ____, No. 20-1063, 2021 WL 79765 (10th Cir. Jan. 11, 2021) (not yet published in permanent law reports).

Utah

FIRST IMPRESSION: PLAINTIFF ASSERTING ENHANCED INJURIES BASED ON DEFECTIVE VEHICLE RESTRAINT SYSTEM MUST ESTABLISH CAUSATION THROUGH EXPERT TESTIMONY

More on Page 3

Continued from Page 2

Utah Court of Appeals: Plaintiffs Andrew and Kathleen Blank were seriously injured when a drunk driver traveling over 100 mph rear-ended their 2008 Mercedes SUV. Kathleen was driving and Andrew was in the passenger seat. In the course of the ensuing collision which resulted in a partial rollover, the Mercedes' passenger-side curtain airbag and driver-side front airbag deployed.

The Blanks filed suit against Mercedes Benz US International, the SUV's manufacturer; Mercedes Benz USA LLC, the SUV's U.S. distributor; and Garff Enterprises Inc., the SUV's ultimate seller (collectively, "Mercedes"), alleging claims on behalf of both Kathleen and Andrew for negligence, strict products liability, and loss of consortium. All claims relied on an enhanced injury theory predicated on alleged defects related to the airbag system, the passenger seat, and the built-in sensor system.

Mercedes moved for partial summary judgment on Kathleen's strict liability and negligence claims and Andrew's derivative claim for loss of consortium, based on the Blanks having presented no evidence to support their theory that a defect on the driver side of the SUV caused Kathleen's enhanced injuries. In response, and more than a year after the first liability expert deposition, the Blanks submitted supplemental declarations in which their experts opined for the first time that the non-deployment of the driver-side curtain airbag constituted a defect rendering the SUV unreasonably dangerous and that the defect had enhanced Kathleen's injuries (these disclosures were ultimately excluded by the district court as untimely).

The trial court granted partial summary judgment in Mercedes' favor, reasoning that Kathleen had not proven that the SUV was defective and that the defect caused her enhanced injuries sufficiently to establish a claim for either strict liability or negligence, and that Andrew's derivative claim for loss of consortium depended on the viability of Kathleen's products liability claims as well.

On appeal, the Utah Court of Appeals held, as a matter of first impression, that a plaintiff asserting a product defect action involving an automobile restraint system cannot establish that the alleged defect was the proximate cause of plaintiff's alleged enhanced injuries absent any expert testimony establishing a causal connection. The Court's ruling was based on its assessment that the functioning of an automobile restraint system is the type of specialized knowledge beyond the ken of the average juror that requires expert testimony. Furthermore, the Blanks produced no evidence to meet their burden of proof on causation. Absent expert testimony establishing a causal connection between the claimed defect in the driver-side airbag and Kathleen's alleged enhanced injuries, there was no genuine issue of material fact for trial on those claims. Thus, the Court affirmed the trial court's grant of partial summary judgment in Mercedes' favor on Kathleen's strict liability and negligence claims, and Andrew's derivative claim for loss of consortium.

Blank v. Garff Enterprises Inc., 2021 UT App 6, ___ P.3d ____ (not yet published in permanent law reports).

Wyoming

VICARIOUS LIABILITY CLAIM FAILS BECAUSE EMPLOYEE'S ASSAULT WAS OUTSIDE COURSE AND SCOPE OF EMPLOYMENT, AND DIRECT NEGLIGENCE CLAIMS AGAINST EMPLOYER FAIL FOR LACK OF DUTY OF CARE

U.S. District Court, Wyoming: Plaintiff Constantin Pauna and Defendant Roger Brownell were both employed by or contracted with different companies as over-the-road truck drivers when Brownell cut in line ahead of Pauna at a truck stop where Pauna was waiting in line to refuel. Pauna got out of his truck and confronted Brownell, who was sitting in his truck. The two exchanged heated words, and Pauna may or may not have pushed Brownell's open truck cab door closed on Brownell. Brownell then jumped out of his truck cab onto Pauna and punched him repeatedly in the head and torso, knocking Pauna unconscious. Pauna was taken to the hospital, and Brownell was arrested and charged with one count of misdemeanor simple assault.

Pauna sued Brownell and Brownell's employer, Defendant Swift Transportation, asserting that as a result of the assault, he had suffered substantial injuries and had been unable to return to work. Pauna sought to hold Swift vicariously liable for the assault, alleged that Swift negligently hired, retained, and/or supervised Brownell, and sought punitive damages. Swift asserted it was entitled to summary judgment because (1) Brownell was not acting within the course and scope of his employment when he assaulted Pauna, (2) Swift did not owe a relevant duty of care concerning its hiring, supervision, and retention of Brownell, and (3) there was no evidence of willful and wanton misconduct on Swift's part to support Pauna's request for punitive damages.

Traditionally, employers may be held vicariously liable for acts their employees commit within the scope of their employment. An employee's conduct is within the scope of his employment only if it: (1) is of the kind he is employed to perform; (2) occurs substantially within authorized time and space limits; and (3) is at least partially actuated by a purpose to serve the master/employer. The scope of employment inquiry is generally a fact question for the jury but can become a question of law when the facts allow only one reasonable inference.

Initially, the Court determined what specific conduct of Brownell was actually at issue. Pauna stressed that Brownell was "refueling his truck in the course and scope of his employment with" Swift at the time of the assault. However, the alleged assault and the refueling process were discrete events, and Pauna produced no evidence suggesting the assault, or even cutting in line, was a necessary step for Brownell to refuel his truck. Brownell ceased the act of refueling

More on page 4

Continued from Page 3

his truck when he attacked Pauna. Thus, the Court considered whether Brownell's conduct in beating Pauna—not refueling—was "within the scope of his employment."

The Court found Swift had carried its initial burden by making a prima facie case that Brownell's assault was not the kind of activity Brownell had contracted with Swift to perform, and was in fact specifically prohibited by Swift company policies, which Brownell knew and acknowledged in his written statement following the incident. Additionally, Swift showed that Brownell's actions were in no part intended to serve Swift's business. Pauna produced no evidence to raise a genuine dispute of material fact as to either the first or third elements to establish that Brownell had acted within the scope of his employment. Thus, the Court held that Swift was entitled to summary judgment on the vicarious liability claim.

Next, the Court considered the direct negligence claims: negligent hiring, negligent retention, and negligent supervision. For each claim, the Court noted that Swift would have owed a duty of care to Pauna if it either knew, or should have known, that Brownell might attack or physically injure members of the public. Pauna cited Brownell's prior criminal record, consisting of two misdemeanor convictions for animal cruelty and disorderly conduct (both several years prior to his employment application), as proof that Swift knew or should have known Brownell was dangerous to the public. However, Brownell's prior misdemeanors were too attenuated from his alleged assault of Pauna to have made the assault foreseeable to Swift. Thus, Pauna's negligent hiring claim failed as a matter of law for lack of a legal duty of care.

The undisputed evidence showed that in attacking Pauna, Brownell left the cab of his truck and therefore was not on Swift's premises and did not use Swift's chattel in committing the alleged assault, and furthermore the assault was unforeseeable. Therefore, the negligent supervision claim similarly failed for lack of a duty of care. The lack of evidence that Swift had learned of Brownell's purported "violent tendencies" after hiring him, meant that the negligent retention claim likewise failed for lack of a duty of care.

Turning to the punitive damages claim, the Court noted that Pauna mistakenly alleged punitive damages as a separate cause of action rather than, appropriately, as an element of an underlying claim. Accordingly, the Court's determination that Swift was entitled to summary judgment on the underlying claims effectively also disposed of the request for punitive damages. Moreover, there was no evidence that would allow an inference that Swift had ratified or approved Brownell's conduct—to the contrary, Swift fired Brownell a few days after the incident. Furthermore, punitive damages are reserved for circumstances involving outrageous conduct, such as intentional torts, torts involving malice and torts involving willful and wanton misconduct. Pauna alleged no intentional act or omission by Swift rising to this level of wrongdoing. The Court held that even if Pauna had a viable claim for direct negligence against Swift that could survive summary judgment, there was no evidence to support punitive damages against Swift.

The Court accordingly granted summary judgment in Swift's favor as to all claims against it. Pauna has filed a pending appeal with the Tenth Circuit Court of Appeals.

Pauna v. Swift Transportation Co. of Arizona, LLC, No. 19-CV-137-SWS, 2021 WL 836859 (D. Wyo. Feb. 16, 2021) (not reported in permanent law reports).

Texas

NEITHER INSURER'S ACCEPTANCE AND PARTIAL PAYMENT OF CLAIM WITHIN STATUTORY DEADLINE, NOR TIMELY PAYMENT OF SUBSEQUENT APPRAISAL AWARD PRECLUDES INSURER'S STATUTORY LIABILITY UNDER TPPCA FOR AMOUNTS OWED BUT UNPAID WHEN STATUTORY DEADLINE EXPIRES

Texas Supreme Court:
Defendant/Insurer State Farm Lloyds accepted and paid part of Plaintiff/Insured Louis Hinojos' homeowner's claim. Dissatisfied with the partial payment, Hinojos filed suit seeking full payment, asserting various claims including violation of the Texas Prompt Payment of Claims Act (TPPCA).

Under the TPPCA, when an insurer receives a claim it has fifteen days to acknowledge receipt, begin an investigation, and request from the claimant all "items, statements, and forms" that the insurer reasonably believes are necessary to evaluate the claim. Within a further fifteen business days of receipt of such requested items, the insurer must inform the claimant in writing whether it accepts or rejects the claim. If an insurer accepts a claim, in whole or in part, it has five business days to pay the insured. To enforce these deadlines, the TPPCA allows a claimant to recover statutory interest at 18% per year, and attorney's fees, in addition to the amount of the claim, when an insurer violates the statute by delaying payment for more than 60 days, or such period specified by other applicable statutes.

The claim at issue arose from damage to Hinojos' home caused by a summer wind and hail storm in 2013. A State Farm adjuster inspected the home nine days after Hinojos reported the claim, and valued the damage below Hinojos' policy deductible; State Farm accordingly informed Hinojos eight days later that it owed nothing on the claim. Hinojos requested a second inspection, which identified additional damage, leading State Farm to send him a letter agreeing that there was "covered damage" in the amount of $3,859.22, and enclosing payment of $1,995.11, reflecting State Farm's assessment of the value of the claim, less the deductible and depreciation.

Almost two years after Hinojos submitted the claim, and fifteen months after he filed suit, State Farm invoked the policy's appraisal clause, which results in binding determination of the amount owed for a covered loss

More on Page 5

Continued from Page 4

under the policy. The appraiser valued the loss at $38,269.95 on a replacement cost basis and $26,259.86 on an actual cash basis. Within a week after the appraiser's decision (about two-and-a-half years after he submitted the claim) State Farm tendered Hinojos an additional $22,974.75, reflecting payment of the appraisal award net of the earlier partial payment, the deductible, and depreciation.

Following the appraisal, State Farm moved for summary judgment, contending that timely tendering of the appraisal award precluded the TPPCA claim. Hinojos argued that State Farm was statutorily liable because it had violated the TPPCA before the appraisal provision was invoked; alternatively, he argued that even if State Farm's partial payment was timely, State Farm was liable for statutory interest on the difference between the appraisal award and the partial payment. The trial court granted summary judgment for State Farm. On appeal, the Court of Appeals affirmed, concluding that State Farm had not violated the TPPCA because it "made a reasonable payment on Hinojos' claim within the sixty-day statutory limit."

Hinojos then petitioned for, and was granted, review by the Texas Supreme Court. After the Court of Appeals ruled in this case, the Texas Supreme Court decided *Barbara Technologies Corp. v. State Farm Lloyds,* 589 S.W.3d 806 (Tex. 2019), in which it held that payment of an appraisal award does not foreclose prompt payment damages when an insurer rejects an insurance claim, because an appraisal payment is neither an acknowledgement of liability nor a determination of liability under the policy for purposes of the TPPCA's damages provision, and has no bearing on any deadlines. "Nothing in the TPPCA would excuse an insurer from liability for TPPCA damages if it was liable under the terms of the policy but delayed payment beyond the applicable statutory deadline, regardless of use of the appraisal process."

Subsequently, in *Alvarez v. State Farm Lloyds,* 601 S.W.3d 781 (Tex. 2020), unlike in *Barbara Technologies*, the insurer accepted the claim under facts parallel to those in Hinojos' case. The Texas Supreme Court reversed summary judgment for the insurer, holding that later payment of the appraisal award did not bar TPPCA liability.

Applying *Barbara Technologies* and *Alvarez*, the Texas Supreme Court held that payment of an appraisal award does not absolve an insurer of statutory liability when an insurer accepts a claim but pays only part of the amount it owes within the statutory deadline, and that an insurer's acceptance and partial payment of the claim within the statutory deadline does not preclude liability for interest on amounts owed but unpaid when the statutory deadline expires. Because State Farm had not paid the full amount that "must be paid" by the statutory deadline, it was not entitled to summary judgment. The Court accordingly reversed and remanded to the trial court.

Hinojas v. State Farm Lloyds, ___ S.W.3d ____, No. 19-0280, 2021 WL 1080854 (Tex. Mar. 19, 2021) (not yet published in permanent law reports).

UIM INSURER ENTITLED TO BIFURCATION WHERE INSURED ALLEGES INSURANCE CODE VIOLATIONS WITHOUT ALLEGING BREACH OF CONTRACT

Texas Supreme Court: In Texas, bifurcation of trial is common practice when the insured under an underinsured motorist ("UIM") policy sues the insurer alleging breach of contract as well as statutory, extracontractual claims under the Insurance Code. Before a plaintiff can litigate the Insurance Code claims, he or she typically must first prevail at an initial trial to determine whether the underinsured motorist was liable for the accident and, if so, the amount of damages suffered by the insured.

Al Dodds and Alexander Nicastro were insured under separate UIM policies issued by State Farm Mutual Automobile Insurance Company. Although they sought recovery of the amount they claimed to be owed under their policies, Dodds and Nicastro brought only extra-contractual claims for alleged violations of the Insurance Code, without claiming breach of contract. They contended that as a result, no bifurcation was required.

Nicastro sued State Farm after it refused to pay any UIM benefits under his policy. In a separate case (prosecuted by the same lawyer) Dodds sued State Farm after it paid less than the amount requested when he sought UIM benefits. Both suits alleged that State Farm failed "to

More on Back Page

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Dewhirst & Dolven's Legal Update
is published quarterly by
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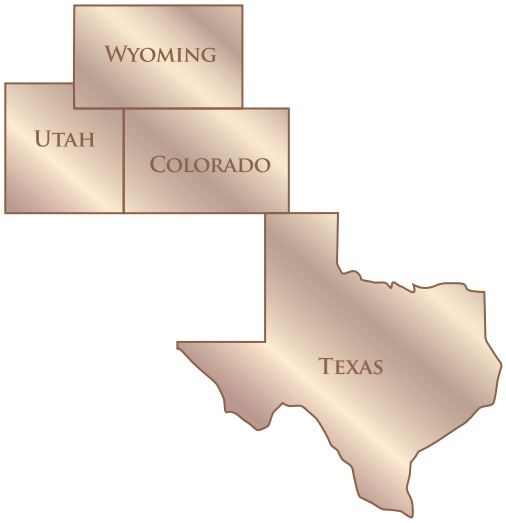

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Continued from Page 5

attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear, as required by Tex. Ins. Code § 541.060(a)(2)(A), and failed to "promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim," as required by Tex. Ins. Code § 541.060(a)(3). Neither suit alleged that State Farm breached the respective UIM policies.

In both cases, State Farm filed motions to bifurcate trial, arguing that an initial trial is necessary to establish liability and underinsured status of the other motorists before its liability for Insurance Code claims can be determined, as the initial trial matters are necessary predicates to the statutory claims. Nicastro and Dodds opposed State Farm's motions, arguing that (1) if they do not allege breach of contract claims, they may recover UIM benefits as extracontractual damages without first establishing that they are "legally entitled to recover" from the underinsured motorists, and (2) the decision in *USAA Texas Lloyds v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), changed well-established principles governing UIM claims. After the trial courts denied State Farm's motions, State Farm petitioned for mandamus relief in the Circuit Court of Appeals arguing abuse of discretion and was denied without substantive explanation. State Farm then filed a mandamus petition with the Texas Supreme Court.

Mandamus is an extraordinary remedy issued only to correct a clear abuse of discretion or violation of a duty imposed by law when there is no other adequate remedy by law.

As a threshold matter, the parties disagreed over what Nicastro and Dodds must show to recover on their Insurance Code claims. State Farm contended that a UIM insurer has no obligation to pay policy benefits as damages for Insurance Code claims unless the insured first establishes the insurer's liability under the UIM policy by obtaining a judicial determination that the other motorist is liable for the crash and has insurance coverage insufficient to cover the insured's damages. Nicastro and Dodd contended that, irrespective of whether they can prove entitlement to policy benefits, State Farm is liable to them for Insurance Code violations if they can show that (1) State Farm failed to offer them fair settlements when its liability became "reasonably clear," or (2) State Farm failed to provide reasonable explanations for its denials of the claims or offers of compromise settlements.

In *Menchaca*, the Texas Supreme Court recognized two ways for an insured to establish damages caused by an insurer's violation of the Insurance Code. If an insured establishes "a right to receive benefits under the policy" he can recover those benefits as "actual damages" under the Insurance Code if the insurer's statutory violation causes the loss of benefits. Alternatively, if an insurer's statutory violation causes "an injury independent of the insured's right to recover policy benefits," the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits. *Menchaca* made clear that recovery in such cases is only available through one or the other of these two pathways.

Nicastro and Dodds argued that State Farm caused them independent injuries by violating the Insurance Code. However, the only injury they asserted was State Farm's failure to adequately pay them under their UIM policies—precisely the theory of recovery foreclosed by *Menchaca*. The Court held that Nicastro and Dodds could not recover for State Farm's alleged Insurance Code violations under an "independent injury" theory because they asserted no independent injury.

Furthermore, although Nicastro and Dodds pleaded their claims differently than prior UIM plaintiffs who pleaded breach of contract as well as statutory Insurance Code claims, the showings they must make to recover are nevertheless the same. Therefore, the Court held that the trial courts abused their discretion by denying State Farm's motions to bifurcate. Furthermore, the Court held that State Farm lacked an adequate appellate remedy due to the denials. The Court therefore conditionally granted State Farm's petitions for writ of mandamus and directed the trial courts to bifurcate, but said the writs would only issue if the trial courts did not comply.

In re State Farm Mutual Automobile Insurance Company, ___ S.W.3d ____, No. 19-0791, 2021 WL 1045651 (Tex. Mar. 19, 2021) (not yet published in permanent law reports).