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Hiding Behind Policy: Confusing Compensation With Indemnification

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NOTE

HIDING BEHIND POLICY: CONFUSING COMPENSATION WITH INDEMNIFICATION

[I]t seems only fair that if, in fact, the insurance company has, by wrongfully refusing to settle, caused the insured to incur substantial damages, it should be the company, not the insured, that should ultimately be responsible. To conclude otherwise is to say that the insurer should not be responsible for the damage it has caused because the amount of the damage it caused was so great.[1]

I. INTRODUCTION

In *PPG Industries, Inc. v. Transamerica Insurance Co.*,[2] the California Supreme Court held that an insurer may not indemnify its insured for a punitive damages judgment in a third party action.[3] Even if the excess judgment is the result of the insurer's bad faith breach of its duty to settle a third party action on behalf of its insured, an insured may not recover if it seeks compensatory damages that include a punitive damages

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[1] ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 5.12, at 325 (3d ed. 1995 & Supp. 1999).

[2] 975 P.2d 652 (Cal. 1999).

[3] *See id.* at 658.

judgment.[4] The California Supreme Court found that to conclude otherwise would violate California's long established public policy precluding indemnification of punitive damages.[5]

This Note examines the faulty reasoning in the California Supreme Court's decision. Part II briefly discusses relevant principles of insurance law. Part III outlines the facts underlying *PPG Industries, Inc. v. Transamerica Insurance Co.,* including the initial Colorado lawsuit that evolved into the case ultimately presented to the California Supreme Court. Part IV explains the procedural history of the case, including the California Court of Appeal's opinion and PPG Industries, Inc.'s appeal to the California Supreme Court. Part V details the California Supreme Court's analysis and its focus on California's public policy against indemnification of punitive damages. Part VI discusses Justice Mosk's heated dissent and his opposition to what he viewed as the majority's apparent favoritism of insurers. Finally, Part VII criticizes the California Supreme Court for ignoring PPG Industries, Inc.'s allegations that it was entitled to recover consequential damages arising from Transamerica's bad faith failure to settle a third party claim, thereby setting a precedent that allows insurers to escape liability for their own tortious conduct.

II. BACKGROUND

The relationship between an insurer and its insured has evolved into one that centers on good faith and fair dealing.[6] Since 1882, courts have recognized the existence of a special relationship between an insurer and its insured, "emphasiz[ing] that the relationship was built on mutual confidence and . . . that a spirit of good faith and fair dealing between the parties should mark every insurance contract."[7] Courts stressed the importance of this relationship as they expanded

[4] *See id.*

[5] *See id.*

[6] *See* WILLIAM M. SHERNOFF, ET AL., INSURANCE BAD FAITH LITIGATION § 1.02, at 1-7 (1999).

[7] *Id.* (citing Germania Ins. Co. v. Rudwig & Co., 80 Ky. 223 (1882)).

an insurer's contractual legal responsibilities to its insured beyond those ordinarily imposed on parties involved in private contracts.[8] They have reasoned that such an expansion is necessary due to the adhesive nature of standardized insurance contracts and the unequal bargaining power created by them.[9] Further, the public nature of the insurance industry and the insured's reliance on the loss protection of the policy have proved to be compelling reasons for courts to hold insurers to a higher standard of conduct.[10]

A. THE DEVELOPMENT OF THE INSURER-INSURED RELATIONSHIP

Historically, the relationship between an insurer and its insured was considered equivalent to the relationship between a debtor and a creditor or, stated more simply, "one contracting party to another contracting party."[11] However, with the advent of the judicially created *implied covenant of good faith and fair dealing,* which provides that an insurer will not infringe upon the insured's right to recover under the terms of its policy, courts have begun to recognize the existence of a fiduciary relationship.[12] In 1980, in *Egan v. Mutual of Omaha Insurance Co.,*[13] the California Supreme Court noted:

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[8] *See* SHERNOFF, *supra* note 6, § 1.02, at 1-8.

[9] *See id.*

[10] *See id.* (citing Healy Tibbits Constr. Co. v. Employers' Surplus Lines Ins. Co., 140 Cal. Rptr. 375 (1977); Egan v. Mutual of Omaha Ins. Co., 598 P.2d 452 (Cal. 1979); and Crisci v. Security Ins. Co., 426 P.2d 173 (Cal. 1967)).

[11] *Id.* § 1.05, at 1-14 (citing COUCH, CYCLOPEDIA OF INSURANCE LAW § 23.11, at 11 (2d ed. 1960)).

[12] *See id.* A fiduciary is defined as a "person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having a duty, created by this undertaking, to act primarily for another's benefit in matters connected with such undertaking . . . ." BLACK'S LAW DICTIONARY 625 (6th ed. 1990). California's jury instructions define a fiduciary relationship as existing "whenever under the circumstances trust and confidence reasonably may be and is reposed by one person in the integrity and fidelity of another." CALIFORNIA JURY INSTRUCTIONS – CIVIL (BAJI) 12.36 (6th ed. 1977).

[13] 598 P.2d 452 (1979), *cert. denied,* 445 U.S. 912 (1980) (holding that the relationship between an insurer and its insured is that of a fiduciary).

> [A]s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public trust must go private responsibility consonant with that trust.[14]

It is important to recognize, however, that in many jurisdictions a fiduciary relationship between an insurer and an insured is not created until the insurer assumes the defense.[15] In other words, in those jurisdictions the "mere existence of the insurer-insured relationship" does not thereby impose a fiduciary duty upon an insurer.[16]

As courts continued to define the realm of the insurer-insured relationship, they also worked diligently to develop tort law.[17] Tort law became frequently utilized by courts in insurance disputes, eventually developing into four theories of recovery applied in insurance law.[18] One of the most common recognized theories of recovery is an insured's breach of the implied covenant of good faith and fair dealing.[19]

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[14] *Id.* (quoting Goodman & Seaton, *Forward: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CALIF. L. REV. 309, 346-347 (1974)).

[15] *See, e.g.* Kosce v. Liberty Mutual Ins. Co., 377 A.2d 1234 (N.J. Super. Ct. Law Div. 1977) (holding that an insurer's fiduciary duty does not extend to refusal to defend a third party action against its insured).

[16] *Id.*

[17] *See* SHERNOFF, *supra* note 6, § 1.06, at 1-16 to 1-17.

[18] *See id* at 1-17.

[19] *See id.* The other tort theories of recovery that have been utilized by courts in insurance disputes are fraud, intentional infliction of mental distress, and tortious interference with a protected property interest. *See id.* (citing DOBBS, LAW OF REMEDIES § 6.12 (2d ed. 1993)). This note will not discuss these theories, but will

B. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The implied covenant of good faith and fair dealing, inherent in every contract, posits "that neither party will do anything to injure the right of the other to receive the benefits of the agreement."[20] Insurance policies are included among the contracts subject to this implied covenant.[21] Although it is the contractual relationship between the insurer and the insured that implicates the duty of good faith and fair dealing, many jurisdictions have also recognized the existence of an extracontractual duty owed by the insurer in fulfilling its obligations under the policy in good faith.[22] These jurisdictions have used the implied covenant "as a basis for defining the duty owed by the insurer to the insured, and have concluded the action is one in tort."[23] For example, the California Supreme Court held in *Gruenberg v. Aetna Insurance Co.*[24] that the duty imposed on the insurer by the covenant of good faith and fair dealing is independent of the performance required under the terms of the contract.[25] Thus, the court reasoned that the mere existence of a contract does not shield an insurer from liability for the torts it commits when it interferes with an insured's right to receive "the benefits of the agreement."[26] In jurisdictions that have similarly found an extracontractual duty of good faith and fair dealing, an insurer's breach of the duty may be subject to either or both the law of torts and/or contracts.[27]

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instead focus on an insurer's breach of the implied covenant of good faith and fair dealing.

[20] *Id.* § 2.01, at 2-1.

[21] *See id.* at 2-1 to 2-2. *See also* Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198 (Cal. 1958).

[22] *See* SHERNOFF, *supra* note 6, § 2.02, at 2-3 (citing Johnsen v. California State Auto. Ass'n Inter-Ins. Bureau, 538 P.2d 744 (Cal. 1975); Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973)).

[23] JOHN F. DOBBYN, INSURANCE LAW IN A NUTSHELL, at 309 (3d ed. 1996).

[24] 510 P.2d 1032 (Cal. 1973).

[25] *See id.*

[26] *Id.*

[27] *See* SHERNOFF, *supra* note 6, § 2.02, at 2-4 (citing Frazier v. Metropolitan Life Ins. Co., 214 Cal. Rptr. 883 (1985) (finding that plaintiff was allowed to choose between tort and contract causes of action)).

Some jurisdictions, however, have yet to impose tort liability upon an insurer for breach of the covenant of good faith and fair dealing, despite the national trend to do so.[28]

Eventually, judicial recognition of the special relationship created between the parties to an insurance contract resulted in the tort of bad faith.[29] Essentially, an insurer's breach of the covenant constitutes bad faith, thereby entitling the insured to restitution or to recover any damages incurred.[30] A majority of jurisdictions have held an insurer liable in third party actions for breaching the duty required by the covenant.[31] A growing number of jurisdictions are expanding this liability to first party actions as well.[32] Generally, to recover in a tort action for breach of the implied covenant of good faith and fair dealing, an insured must demonstrate that "the insurer had a duty to the insured, the insurer breached that duty, and the insured suffered damage as a proximate result of the breach."[33] An insurer may defend itself against such a claim by demonstrating that the underlying claim is not covered by the policy, or that a contract either does not exist or is voidable.[34]

C. AN INSURER'S DUTY TO SETTLE

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[28] *See id.* § 2.02, at 2-5. *See, e.g.,* Gordon v. Nationwide Mutual Insurance Co., 285 N.E.2d 849 (N.Y. Ct. App. 1972). The categorization of a cause of action for breach of the implied covenant of good faith and fair dealing as either contract or tort "has not appeared to affect the remedies available against the insurer, [however] it does determine which of the two statute of limitations is to be applied." DOBBYN, *supra* note 23, at 309. Generally, "the primary differences in characterizing an action as one in tort rather than contract are: the statute of limitations that will fix the time within which the action must be brought; the nature of the conduct that will prove the breach; and the type of damages that can be recovered." 2 CALIFORNIA LIABILITY INSURANCE PRACTICE: CLAIMS AND LITIGATION § 24.3, at 24-6 (Bob Pickus, et al. eds. 1999).

[29] *See* SHERNOFF, *supra* note 6, § 1.08, at 1-31 to 1-38.

[30] *See id.* § 2.01, at 2-2. *See, e.g.,* Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198 (Cal. 1958).

[31] *See id.*

[32] *See* SHERNOFF, *supra* note 6, § 2.01, at 2-2.

[33] 2 CALIFORNIA LIABILITY INSURANCE PRACTICE: CLAIMS AND LITIGATION § 24.25, at 24-20 (Bob Pickus et al. eds. 1999).

[34] *See id.* § 24.48, at 24-37 to 24-38.

An insurer's duty to settle actions pending against its insured is implied in the covenant of good faith and fair dealing.[35] This duty is owed solely to the insured.[36] As such, only the insured has standing to sue the insurer for a breach,[37] which typically occurs when an insurer fails "to accept a reasonable settlement offer within policy limits."[38] Once an insurer's breach is proven, the insured is entitled to recover "the full amount of the underlying judgment, including the amount exceeding the policy limits, and for any other consequential damages suffered by the insured, such as damages for emotional distress."[39] Upon a showing that the insurer's conduct in failing to settle was oppressive or fraudulent, the insured may also be entitled to recover punitive damages.[40] However, even if an insurer is not liable for failing to accept a reasonable settlement offer, its overall conduct during settlement negotiations may still amount to a bad faith breach of the implied covenant of good faith and fair dealing.[41] More importantly, an insurer does not have to actually act in bad faith to breach its duty to settle.[42] Rather, an insured must only show that the insurer failed to settle a claim "that it would have settled had it treated the claim as if [it] alone would be liable for the entire potential verdict."[43]

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[35] *See id.* § 26.2, at 26-3 (citing Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 201 (Cal. 1958)).

[36] *See id.* § 26.3, at 26-3.

[37] *See id.* It is important to note that anyone who has "acquir[ed] the insured's rights against the insurer" also has "standing to sue the insurer for breach of the duty to settle." For example, "a third party claimant commonly acquires the insured's right to sue through an assignment. The assignment does not change the basic nature of the action as one that must be evaluated exclusively in terms of the insured's rights." *Id.*

[38] PICKUS, ET AL., *supra* note 32, § 26.4 at 26-3 to 26-4.

[39] *Id.*

[40] *See id.* § 26.35, at 26-21.

[41] *See id.* § 26.5, at 26-4.

[42] *See* WINDT, *supra* note 1, § 5.12, at 323.

[43] *Id.*

It is important to recognize that an insurer's duty to settle arises only when the policy covers the loss claimed in a third party action.[44] Once this duty arises, an insurer is obligated by the covenant of good faith and fair dealing to settle a third party action against its insured "when there is a great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits."[45] Although an insurer's duty is usually triggered by a settlement offer that is within policy limits, "case law suggests that any settlement offer triggers the insurer's duty of good faith to its insured and requires the insurer at least to explore the offer."[46] Thus, as part of its duties implied in the covenant of good faith and fair dealing, an insurer is obligated to give, at a minimum, equal weight to the insured's and its own interests.[47]

At the point that the insurer unreasonably refuses to settle, the breach occurs.[48] However, the statute of limitations does not begin to run "until the insured suffers a binding judgment in excess of the policy limits and damages can be ascertained."[49] As previously stated, an insured may bring an action against its insurer for failure to settle under either a contract theory or a negligence theory, depending on the jurisdiction.[50] Although the statute of limitations is longer for contract actions, an insured that chooses to sue in contract may lose its right to recover punitive damages.[51] In pleading an

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[44] *See* PICKUS, ET AL., *supra* note 32, § 26.18, at 26-9 (citing Heredia v. Farmers Ins. Exch., 279 Cal. Rptr. 511 (1991); Allen v. Allstate Ins. Co., 656 F.2d 487 (9th Cir. 1981), Merrit v. Reserve Ins. Co., 110 Cal. Rptr. 511 (1973); Tan Jay Int'l v. Canadian Indem Co., 243 Cal. Rptr. 907 (1988); and Continental Cas. Co. v. Royal Ins. Co., 268 Cal. Rptr. 193 (1990)).

[45] Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 201 (Cal. 1958).

[46] PICKUS, ET AL., *supra* note 32, § 26.14, at 26-8.

[47] *See Comunale*, 328 P.2d at 201.

[48] *See* PICKUS, ET AL., *supra* note 32, § 26.12, at 26-7.

[49] *Id.*

[50] *See id.* at § 26.11, at 26-7.

[51] *See id.* The statute of limitations for an action based on a written contract is four years after the action accrues. *See* CAL. CIV. PROC. CODE § 337 (Deering 1999). There

action for negligent failure to settle, the applicable standard is "whether a prudent insurer, without policy limits, would have accepted the offer."[52] To successfully prove a cause of action for failure to settle, the insured must show: first, the insurer had a contractual duty to "indemnify the insured for loss resulting from the underlying claim;" second, the insurer had "a duty to settle the claim within policy limits;" third, the insurer breached its duty by "either refusing a reasonable settlement offer within policy limits or failing to explore settlement within the policy limits on a conditional offer;" and fourth, the insurer's breach proximately caused the insured's damage.[53]

D. INDEMNIFICATION OF PUNITIVE DAMAGES

1. California: A Policy Against Indemnification

California has long had a public policy prohibiting indemnification by an insurer of a punitive damages judgment against its insured.[54] California Civil Code section 1668 states that any contract which seeks to exempt an individual "from responsibility for his own fraud or willful injury to...another...[is] against the policy of law."[55] Additionally, California Insurance Code section 533 specifically bars insurer liability "for the willful act of the insured."[56] Thus, because punitive damages are recoverable only when a wrongdoer has

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is an exception to title insurance policies that have a two year statute of limitations. *See* CAL. CIV. PROC. CODE § 339 (1) (Deering 1999). Actions based on an oral contract have a two year statute of limitations. *See id.* There are several tort statutes of limitation which are applicable to actions based on an insurer's breach of the implied covenant of good faith and fair dealing. "The nature of the right sued on, and not the nature of the remedy sought, determines which of the various tort statutes of limitation" will apply. PICKUS, ET AL., *supra* note 32, § 24.18 at 24-15 (citing Purdy v. Pacific Auto Ins. Co., 203 Cal. Rptr. 524, 537 (1984)).

[52] PICKUS, ET AL., *supra* note 32, § 26.6, at 26-5. The standard is the same whether the action is pleaded in contract or in tort. *See id.*

[53] *Id.* § 26.13, at 26-7 to 26-8.

[54] *See* JUSTICE H. WALTER CROSKY, ET AL, CALIFORNIA PRACTICE GUIDE, INSURANCE LITIGATION § 7:343 (1995). *See also* CAL. CIV. CODE § 533 (Deering 1999).

[55] CAL. CIV. CODE § 1668 (Deering 1999).

[56] CAL. INS. CODE § 533 (Deering 1999).

acted with "malice, fraud or oppression,"[57] which by their nature are willful acts, section 533 effectively prohibits indemnification of punitive damages arising out of a third party lawsuit.[58] The policy's rationale centers on the notion that an insured should not be allowed to pass on to its insurer liability to a third party arising from its intentional conduct.[59] Thus, even if an insurance policy does not specifically exclude an insured's claim for such damages, the public policy prohibition is implied.[60]

2. *Other States Not Subject to California Public Policy*

Although California has a strong public policy prohibiting indemnification of punitive damages, out-of-state punitive damage awards may not be subject to its policy.[61] Currently, jurisdictions differ regarding the insurability of punitive damages.[62] In jurisdictions that prohibit indemnification, such as California, punitive damages are allowed only in instances of egregious conduct and for the sole purpose of punishing and deterring the conduct.[63] These jurisdictions believe that insuring such conduct would undermine this policy.[64] On the other hand, jurisdictions that allow indemnity tend to award punitive damages at lower thresholds, such as "gross negligence or reckless and wanton conduct."[65] These jurisdictions often recognize the unfairness of not indemnifying an insured

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[57] CAL. CIV. CODE § 3294 (Deering 1999).

[58] *See* CROSKY, ET AL, *supra* note 54, § 7:345. *See also* CAL. CIV. CODE § 533 (Deering 1999).

[59] *See id.* at § 7:343 (quoting City Products Corp. v. Globe Indem. Co., 151 Cal. Rptr 494, 496 (1979)).

[60] *See id.* at § 7:344 (quoting Ohio Cas. Ins. Co. v. Hubbard, 208 Cal. Rptr. 806, 810-811 (1985)).

[61] *See id.* at § 7:346 (citing Continental Cas. Co. v. Fireboard Corp., 762 F.Supp. 1368 (N.D. Cal. 1991), aff'd without published opn., 953 F.2d 1386 (9th Cir. 1992)).

[62] *See, e.g.,* City Products Corp. v. Globe Indemnity Co., 151 Cal. Rptr. 494 (Cal. Ct. App. 1979).

[63] *See* City Products Corp. v. Globe Indemnity Co., 151 Cal. Rptr. 494 (Cal. Ct. App. 1979).

[64] *See id.*

[65] *Id.*

"who might well be ruined financially by a judgment for punitive damages as the result of conduct of no more flagrancy than an act of 'gross negligence,' a monetary 'reckless' act, or conduct 'contrary to social interests.' "[66] Thus, California's public policy against indemnification of punitive damages would not necessarily preclude coverage of a judgment against a California insured for an out-of-state award of punitive damages.[67] Although California has an interest in awarding punitive damages to punish and deter misconduct by its own citizens, it does not have an interest in deterring conduct in other states.[68] Thus, when a plaintiff in another state is awarded punitive damages for a defendant's reckless or wanton conduct, as opposed to malicious, fraudulent, or oppressive conduct, California's anti-indemnification policy may not apply.[69] In such circumstances, the insurer is obligated to pay the judgment under the terms of the policy.[70]

III. *PPG INDUSTRIES, INC. V. TRANSAMERICA INSURANCE CO.*

In 1987, PPG Industries, Inc. ("PPG") became the successor in interest to Solaglas California, Inc. ("Solaglas"), which distributed and installed replacement windshields in cars and trucks.[71] Upon doing so, PPG became financially liable for a Colorado judgment against Solaglas that exceeded Solaglas' insurance policy limits.[72] Prior to trial in the underlying law-

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[66] *Id.* (quoting Harrell v. Travelers Indem. Co., 567 P.2d 1013, 1921 (Or. 1977)).

[67] *See* EUGENE R. ANDERSON, ET AL., INSURANCE LITIGATION COVERAGE § 8.01, at 8-3 to 8-4 (2d ed. 2000) (discussing application of New York's public policy against indemnification of punitive damages to out-of-state awards).

[68] *See* Zimmerman v. Allstate Ins. Co., 224 Cal. Rptr. 917 (1986).

[69] *See* CROSKY, ET AL., *supra* note 54, § 7:346 (citing Continental Cas. Co. v. Fireboard Corp., 762 F.Supp. 1368 (N.D. Cal. 1991), aff'd without published opn., 953 F.2d 1386 (9th Cir. 1992).

[70] *See* ANDERSON, ET AL., *supra* note 67, § 8.01, at 8-4.

[71] *See* PPG Indus., Inc. v. Transamerica Ins. Co., 56 Cal. Rptr. 2d 889, 891 (Cal. Ct. App. 1996).

[72] *See* Petitioner's Brief on the Merits at 4, PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652 (Cal. 1999) (No. S056618).

suit, Solaglas' insurer, Transamerica Insurance Company ("Transamerica"), refused several settlement offers that were within policy limits despite Solaglas' high risk of suffering an excess judgment.[73] The trial ultimately resulted in a one million dollar punitive damages judgment against Solaglas.[74] PPG sued Transamerica in California, claiming that as Solaglas' insurer, Transamerica breached its duty to settle inherent in the implied covenant of good faith and fair dealing.[75]

A. THE FACTS THAT INSTIGATED A THIRD PARTY LAWSUIT AGAINST SOLAGLAS

On April 18, 1980, an acquaintance ("Buyer") of George Miller, the injured party, purchased a 1980 General Motors Corporation ("GMC") light-duty pickup truck from a dealer.[76] Several days after the purchase, Buyer "returned to the dealer to have a crack in the truck's windshield repaired."[77] As was its practice, the dealer sent the warranty windshield repair order to Solaglas.[78] Pursuant to the dealer's request, Solaglas installed a replacement windshield.[79] Despite specifications in GMC manuals, industry publications, and safety regulation requirements, Solaglas installed the windshield without a urethane seal.[80] Typically, windshields installed without urethane seals require about thirty minutes of labor.[81] Evidence showed, however, that Solaglas charged for 2.8 hours of labor to install the windshield without a urethane seal.[82]

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[73] *See id.*

[74] *See id.*

[75] *See* PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 655 (Cal. 1999).

[76] *See* Miller v. Solaglas California, Inc., 870 P.2d 559, 562 (Colo. Ct. App. 1993). The court did not identify the buyer of the truck.

[77] *Id.*

[78] *See id.*

[79] *See PPG*, 975 P.2d at 654.

[80] *See PPG*, 56 Cal. Rptr. 2d at 891.

[81] *See id.*

[82] *See id.*

On July 17, 1983, Buyer loaned the truck to George Miller.[83] While Miller was driving, he approached an intersection at which the traffic lights were out of order.[84] Miller slowed down, but did not stop, and continued to enter the intersection.[85] The truck was struck from behind by another vehicle.[86] As a result of the impact, the truck was forced onto a curb at the corner of the intersection and collided into a metal light pole.[87] At some point during the collision, the truck's windshield "popped out"[88] and Miller, who was not wearing a seat belt, was thrown through the windshield opening.[89] The collision instantly rendered Miller a quadriplegic.[90] Miller subsequently filed suit against Solaglas in Colorado.[91] In 1987, PPG purchased stock in Solaglas, thus becoming its successor in interest and a defendant in Miller's lawsuit.[92]

B. *MILLER V. SOLAGLAS*: ROUND ONE[93]

In 1983, Miller sued GMC, Solaglas, and the truck dealer, seeking both compensatory and punitive damages for negligence and strict liability.[94] GMC and the dealer each settled with Miller during the first trial, leaving Solaglas as the sole

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[83] *See Miller*, 870 P.2d at 562.

[84] *See id.*

[85] *See id.*

[86] *See PPG*, 975 P.2d at 654.

[87] *See Miller*, 870 P.2d at 562.

[88] *PPG*, 975 P.2d at 654.

[89] *See Miller*, 870 P.2d at 562.

[90] *See id.*

[91] *See PPG*, 975 P.2d at 654.

[92] *See PPG*, 56 Cal. Rptr. 2d at 891. A successor in interest is "one who follows another in ownership or control of property. . . . In the case of corporations, the term ordinarily indicates statutory succession as, for instance, when a corporation changes its name but retains same property." BLACKS LAW DICTIONARY at 1431-1432 (6th ed. 1990).

[93] 870 P.2d 559 (Colo. Ct. App. 1993).

[94] *See id.* at 562.

defendant.[95] At the time of the incident, Solaglas was covered by several insurance polices.[96] Two of the polices were issued to Solaglas by its liability insurance carrier, Transamerica, and had a combined coverage totaling $1.5 million per occurrence.[97] Solaglas also carried a nine million dollar excess liability insurance policy issued by Industrial Indemnity Company.[98] Solaglas tendered the defense to Transamerica, giving timely notice of the lawsuit.[99] Upon agreeing to provide the defense in the *Miller* action, Transamerica informed Solaglas that neither of its Transamerica insurance policies provided coverage for any punitive damages awarded against it.[100] Under a reservation of rights, Transamerica appointed independent counsel to defend Solaglas.[101]

Although settlement negotiations began early in the process, all attempts to settle the lawsuit between Miller and Solaglas proved unsuccessful.[102] Miller offered to settle the case for $1.5 million, the total coverage provided by the Transamerica policies.[103] However, Transamerica refused to offer more that $250,000, despite independent counsel's recommendation that

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[95] *See id.* The court did not specify what amounts GMC and the truck dealer settled for.

[96] *See PPG*, 56 Cal. Rptr. 2d at 891.

[97] *See id.*

[98] *See id.* Excess insurance policies cover "the excess above and beyond that which may be collected on other insurance." BLACKS LAW DICTIONARY at 562 (6th ed. 1990).

[99] *See PPG*, 56 Cal. Rptr. 2d at 891.

[100] *See PPG*, 975 P.2d at 654.

[101] *See PPG,* 56 Cal. Rptr. 2d at 891. A reservation of rights notice "is a unilateral statement by the insurer in writing notifying the insured of the insurer's intention to continue with the defense while retaining the right to press all issues that could lead to a finding of noncoverage. The primary purpose of the notice is to make the insured aware of the insurer's full intentions so that the insured cannot later claim that the insurer waived its rights to claim noncoverage or is estopped to make such a claim because the insured was misled into believing that the insurer had accepted liability on the policy. Such notice is also intended to make the insured aware of the fact that the insurer may decide to withdraw from the defense of the tort action at any time, and, therefore, the insured would be well advised to hire his own attorney and conduct his own investigation." DOBBYN, *see supra* note 23, at 309.

[102] *See PPG*, 975 P.2d at 654.

[103] *See PPG*, 56 Cal. Rptr. 2d at 891.

Transamerica offer Miller at least $750,000 to settle the case.[104] With settlement negotiations having failed, the case was tried before a jury in 1986.[105] The trial court dismissed Miller's claim for punitive damages and failed to instruct the jury on Miller's strict liability claim.[106] Thereafter, the jury returned a verdict in favor of Solaglas.[107] The jury found that Solaglas did in fact act negligently, but that its negligence did not cause Miller's injuries.[108] Miller appealed to the Colorado Court of Appeals[109] which reversed the jury's verdict and remanded the case "for a new trial on all issues."[110]

Prior to the second trial in January 1991, Miller again offered to settle with PPG, which had since become the successor in interest to Solaglas, reducing his demand to one million dollars.[111] Again, Transamerica rejected Miller's demand and subsequently reduced it own settlement offer to $100,000.[112] On at least four separate occasions throughout settlement negotiations, PPG demanded that Transamerica settle within the policy limits.[113] Each time, Transamerica denied PPG's request[114] despite damaging deposition testimony presented by one of PPG's experts and a trial court ruling that Miller had "made the prima facie showing necessary to discover financial information related to his punitive damages claim."[115]

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[104] *See id.*

[105] *See id.*

[106] *See id.*

[107] *See Miller*, 870 P.2d at 562.

[108] *See id.*

[109] *See* Miller v. Solaglas California, Inc., No. 86CA1213 (Colo. Ct. App. September 8, 1988). Miller "did not appeal the trial court's failure to instruct the jury on his strict liability claim." *Miller*, 870 P.2d at 562.

[110] *Miller*, 870 P.2d at 562 (citing Miller v. Solaglas California, Inc., No. 86CA1213 (Colo. Ct. App. 1993)).

[111] *See PPG*, 56 Cal. Rptr. 2d at 891.

[112] *See id.*

[113] *See* Petitioner's Brief, *supra* note 72, at 4. *See also PPG*, 56 Cal. Rptr. 2d at 891.

[114] *See PPG*, 975 P.2d at 654.

[115] Petitioner's Brief, *supra* note 72, at 4.

C. *MILLER V. SOLAGLAS*: ROUND TWO

The second trial resulted in a jury verdict against Solaglas and PPG, finding both entities negligent and strictly liable for Miller's injuries.[116] The jury did not find any comparative negligence on Miller's part and, thus, awarded him $5.1 million in compensatory damages, which included "$2.6 million for economic damages" and "$2.5 million for mental pain and suffering."[117] The jury also awarded one million dollars in punitive damages, which was primarily awarded based on Solaglas' failure to use urethane seals during the installation of the windshield, yet charging Miller for the labor hours that would have been required had urethane seals been used.[118] Before entering the final judgment, however, the trial court offset the jury award by the amount of Miller's prior settlements with GMC and the truck dealer, and then added prejudgment interest to the resulting sum.[119]

Solaglas appealed the final judgment to the Colorado Court of Appeals, and Miller cross-appealed the trial court's calculation of the prejudgment interest.[120] Solaglas contended that there was no evidence to support the one million dollar puni-

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[116] *See PPG*, 56 Cal. Rptr. 2d at 891.

[117] *Miller*, 870 P.2d at 562. *See also PPG*, Cal. Rptr. 2d at 891.

[118] *See id.*

[119] *See Miller*, 870 P.2d at 562.

[120] *See id.* Since PPG's suit against Transamerica concerned the jury's award of punitive damages, *see PPG*, 975 P.2d 652, this note will only discuss that aspect of the decision rendered by the Colorado Court of Appeals. In sum, the Colorado Court of Appeals held that: (1) defendants waived their right to assert a defense of res judicata by failing to set forth the defense in their answer to plaintiff's complaint; (2) the jury could have found that Solaglas was a manufacturer for purposes of Miller's products liability claim; (3) the jury could have found that Miller's negligence in failing to stop at the intersection did not proximately cause the accident and that Miller's injuries would have occurred despite his negligence; (4) the trial court's admission of safety codes and standards was not reversible error; (5) evidence presented by Miller warranted award of exemplary damages; (6) the trial court's admission of video deposition testimony was not reversible error; and (7) the trial court correctly offset the jury award by the amount of the settlements with GMC and the truck dealer before adding prejudgment interest. *See id.* at 559.

tive damages award.[121] The Court of Appeals disagreed, recognizing that juries have the authority to award "reasonable exemplary damages" in any case "in which damages are assessed and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct."[122] Thus, a plaintiff need only show beyond a reasonable doubt that the conduct causing the injury was done so "with an evil intent" to injure the plaintiff, "or with such wanton and reckless disregard of the plaintiff's rights as to demonstrate a wrongful motive."[123]

The Court of Appeals determined that Miller presented sufficient evidence demonstrating that after thirty years of experience in glass replacement, Solaglas deliberately made it standard practice to install replacement windshields with silicone instead of urethane.[124] Solaglas followed this policy "despite a GMC manual requiring the use of urethane . . . , despite a NAGS Calculator parts list and price guide indicating that urethane could be required . . . , despite industry publications and conventions discussing the use of urethane, and despite industry safety standards requiring the use of urethane."[125] Miller further provided evidence that Solaglas instructed its stores to charge for 2.8 hours of labor for the installations of windshields without a urethane seal even though such installation only required thirty minutes.[126] In affirming the verdict, the court concluded that a jury could have found

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[121] *See PPG*, 975 P.2d at 654. Specifically, defendants argued that the evidence presented at trial was insufficient to support the jury's finding that Miller "proved beyond a reasonable doubt that Solaglas' conduct warranted the jury's award of $1 million in exemplary damages." *Miller*, 870 P.2d at 568.

[122] *Miller*, 870 P.2d at 568 (citing COLO. REV. STAT. § 13-21-102(1)(a) (1987)).

[123] *Id.* (citing Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671 (Colo. 1985) and Frick v. Abell, 602 P.2d 852 (Colo. 1979)). The Colorado Court of Appeals defined "wanton and reckless conduct" as "conduct that creates a substantial risk of harm to another and is purposefully performed with an awareness of the risk in disregard of the consequences." *Miller*, 870 P.2d at 668 (citing Tri-Aspen Construction Co. v. Johnson, 714 P.2d 484 (Colo. 1986); Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984); and Colo. Rev. Stat. § 13-21-102(1)(b) (1987)).

[124] *See Miller*, 870 P.2d at 569.

[125] *Id.*

[126] *See id.*

beyond a reasonable doubt that Solaglas purposely performed the installation of the windshield without the urethane seals with disregard for the consequences of its actions, aware that such conduct "created a substantial risk of harm to others."[127]

PPG appealed to the Colorado Supreme Court. While its appeal was pending, however, Miller offered to settle the case for $4,500,000.[128] Again, Transamerica refused to accept Miller's offer.[129] After the Colorado Supreme Court denied PPG's petition for certiori in 1994, Transamerica paid $1.5 million, its combined policy limit, towards the $5.1 million jury verdict, and $1,277,094.88 for Miller's costs and interest accrued on the judgment.[130] Industrial Indemnity, PPG's excess carrier, paid the remaining $3.6 million in compensatory damages under Solaglas' excess liability coverage.[131] PPG, as Solaglas' successor in interest, was left to pay the one million dollars in punitive damages awarded to Miller.[132]

IV. PROCEDURAL HISTORY

In June 1994, PPG sued Transamerica in California alleging that Transamerica breached the covenant of good faith and fair dealing implied in its policies.[133] PPG argued that Transamerica breached the covenant by refusing to settle the *Miller* action, despite requests by Solaglas and PPG to do so.[134] Thus, Transamerica was required to compensate PPG for the one

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[127] *Id.* The Colorado Court of Appeals denied Miller's claim that the trial court "erred in calculating prejudgment interest" since the court had previously held that settlement proceeds "be deducted before adding statutory interest." *Id.* at 571 (citing McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. Ct. App. 1989)).

[128] *See* Petitioner's Brief, *supra* note 72, at 4.

[129] *See id.*

[130] *See PPG*, 56 Cal. Rptr. 2d at 891.

[131] *See PPG*, 975 P.2d at 655.

[132] *See id.* None of the decisions explain the extent of Industrial Indemnity's involvement in the settlement negotiations.

[133] *See* PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 655 (Cal. 1999).

[134] *See id.*

million dollars in punitive damages that it was ordered to pay in the *Miller* action.[135]

In October 1994, Transamerica filed a motion for summary judgment, claiming that it was not obligated to indemnify PPG for the punitive damages awarded in the *Miller* lawsuit.[136] Transamerica based its claim on the principle that an insurer is not responsible for indemnifying an insured for a punitive damages judgment, even if the insurer was unreasonable in its failure to settle the case within the coverage policy limits.[137] In September 1995, the trial court granted Transamerica's motion for summary judgment.[138] PPG appealed.[139]

The sole issue presented to the California Court of Appeal was "whether consequential damages for breach of an insurer's duty to reasonably settle a third party action can include punitive damages imposed against the insured in the third party action."[140] The court noted that California's public policy allows a plaintiff to recover punitive damages only to punish a defendant for fraudulent or malicious conduct, and thereby use the defendant as an example to deter similar future conduct.[141] Allowing a defendant to be indemnified by its insurer for a punitive damages judgment would frustrate this policy by removing both the punishment and the threat of future punishment.[142] This rationale applies, the court continued, even when

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[135] *See id.*

[136] *See* PPG Indus., Inc. v. Transamerica Ins. Co., 56 Cal. Rptr. 2d 889, 891 (Cal. Ct. App. 1996).

[137] *See id.*

[138] *See id.*

[139] *See id.*

[140] *Id.*

[141] *See PPG,* 56 Cal. Rptr. 2d at 892 (citing City Products Corp. v. Globe Indemnity Co., 151 Cal. Rptr. 494 (1979)).

[142] *See id.* The Court of Appeal further noted that "public policy would likewise be frustrated by indemnification of punitive damages assessed against a successor corporation for the wrongful conduct of its predecessor. Indeed, were indemnification allowed when a successor corporation is liable for punitive damages due to the conduct of its predecessor, public policy could easily be frustrated by a restructuring of any corporation facing the imposition of punitive damages." *Id.*

the insured seeks to "pass on" the punitive damages to the insurer based on the insurer's "unreasonable refusal to settle."[143]

The court recognized that in some instances, the insurer's refusal to settle may rise to the same level of culpability as that of the insured.[144] As such, the insurer can be held liable for bad faith to its insured for punitive damages.[145] However, even if the insurer's conduct in refusing to settle justifies a punitive damages award, the insured cannot avoid punishment for its own conduct by passing on its liability for punitive damages to its insurer.[146] To do so would violate public policy.[147] Thus, the court concluded that although there would have been no punitive damages award had Transamerica settled within its policy limits in the *Miller* action, Solaglas' conduct in installing the windshield was also a cause of the award.[148] Accordingly, as a matter of public policy, the Court of Appeal concluded that PPG, as successor in interest, was financially responsible for the punitive damages awarded against Solaglas in the *Miller* action.[149] PPG subsequently petitioned the California Supreme Court for review.[150]

V. THE MAJORITY'S ANALYSIS

The California Supreme Court granted PPG's petition for review on December 18, 1996.[151] The main issue presented to

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[143] *Id.* at 896.

[144] *See id.*

[145] *See id.*

[146] *See PPG*, 56 Cal. Rptr. 2d at 896.

[147] *See id.*

[148] *See id.* PPG argued that since "the punitive damages would not have been awarded had Transamerica accepted a settlement within policy limits," the punitive damages were "akin to any other damages which may arise as a consequence of an insurer's breach of the duty of good faith." *Id.*

[149] *See id.* at 896-97.

[150] *See PPG*, 975 P.2d at 655.

[151] *See* PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 655 (Cal. 1999). *See also* Brief of Amicus Curiae Lawyer's Mutual Insurance Company In Support of

the court was whether an insured can sue its insurer for compensatory damages in an amount equal to a punitive damages judgment rendered against the insured in a third party lawsuit.[152] The court held that such recovery is precluded and would violate California's public policy.[153]

A. GOOD FAITH AND FAIR DEALING VERSUS CAUSATION

The Court began its analysis with a discussion of the implied covenant of good faith and fair dealing.[154] This covenant imposes certain obligations upon insurance companies, including the "obligation to accept a reasonable offer of settlement."[155] An insurer's failure to meet any of the obligations imposed by the covenant is a breach of the covenant and may result in tort liability on the part of the insurer.[156] Thus, if an insurer's breach of the covenant proximately causes injury to the insured, the insurer may be liable for any resulting damages.[157] In the instant case, PPG argued that had Transamerica settled the *Miller* action, the possibility of a lawsuit would have been terminated and, thus, Solaglas' liability for punitive damages would have been avoided.[158] Consequently, PPG contended that Transamerica's failure to settle with Miller proximately caused the jury's punitive damages award.[159]

In response to PPG's argument, the California Supreme Court agreed that Transamerica's failure to settle the *Miller*

Respondent Transamerica Insurance Company at 3, PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652 (Cal. 1999) (No. S056618 (1999)).

[152] *See PPG*, 975 P.2d at 655.

[153] *See id.* at 658.

[154] *See id.* at 655.

[155] *Id.*

[156] *See id.* (citing Foley v. Interactive Data Corp., 765 P.2d 373 (1988)).

[157] *See PPG*, 975 P.2d at 655.

[158] *See id.*

[159] *See id.*

action was a cause-in-fact of the punitive damages award.[160] However, the court did not agree that Transamerica's failure to settle was a proximate cause of the award.[161] In making this distinction, the court explained that to prove that a defendant caused a plaintiff's injuries, a plaintiff must establish that the defendant's conduct was a cause-in-fact of plaintiff's injuries and that the defendant's conduct proximately caused plaintiff's injuries.[162] The court defined a cause-in-fact as "a necessary antecedent of an event."[163] The court noted that in the instant case, Solaglas' intentional misconduct during the windshield installation was a cause-in-fact of the punitive damages award.[164] However, the court also conceded that PPG would not have been exposed to liability for punitive damages had Transamerica settled the *Miller* action.[165] Nevertheless, the court concluded that a determination of whether "the defendant's conduct was a necessary antecedent of the injury does not resolve the question of whether the defendant should be liable."[166] Rather, in determining proximate cause, public policy limitations must be imposed in addition to causation standards.[167] The court then went on to discuss three public policy considerations which it considered to "militate" against allow-

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[160] *See id.*

[161] *See id.*

[162] *See PPG*, 975 P.2d at 655 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 41, at 265 (5th ed. 1984)).

[163] *Id.* The court did not further analyze this point.

[164] *See id.* at 655-66.

[165] *See id.*

[166] *Id.* at 656. The court continued, "the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.' " *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 41, at 264 (5th ed. 1984) (quoting North v. Johnson, 59 N.W. 1012 (1894)).

[167] *See PPG*, 975 P.2d at 655. The court continued, "Justice Traynor observed, proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' " *Id.* (quoting Mosley v. Arden Farms Co., 157 P.2d 372 (1945) (Traynor, J., concurring)).

ing indemnification of punitive damages rendered against an insured as a result of its own misconduct.[168]

B. CALIFORNIA'S PUBLIC POLICY

According to the court, three public policy reasons prohibited indemnification by Transamerica.[169] First, liability for intentional misconduct cannot be mitigated by another's negligence.[170] Second, punitive damages are intended to punish the wrongdoer and to deter such conduct in the future.[171] Third, a wrongdoer cannot receive indemnification for punitive damages.[172]

1. One's Liability Cannot Be Offset by the Negligence of Another

The court first considered California's public policy prohibiting mitigation of liability for intentional misconduct due to another's negligence.[173] Relying on both California and Colorado law, the court stated that punitive damages may only be awarded where the plaintiff has proven that the defendant intentionally engaged in misconduct to cause injury to the plaintiff, or did so "with a conscious disregard of the rights or safety of others."[174] In the underlying action, punitive damages were awarded to Miller based on the jury's determination that Solaglas' installation of the windshield was intentional

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[168] *PPG*, 975 P.2d at 656.

[169] *See id.*

[170] *See id.*

[171] *See id.*

[172] *See id.* at 656-57.

[173] *See PPG*, 975 P.2d at 656 (citing 6 WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS § 1057 (9th ed. 1988) and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, §65, at 462 (5th ed. 1984)).

[174] *PPG*, 975 P.2d at 656-57 (citing CAL. CIV. CODE § 3294 (a) and (c) (Deering 1999); Miller v. Solaglas, 870 P.2d 559, 568 (Colo. Ct. App. 1993)). The California Supreme Court determined that since the rule regarding punitive damages is the same in both California and Colorado, "punitive damages awarded under Colorado law are equivalent in all relevant respects to punitive damages awarded under California law." *PPG*, 975 P.2d at 656.

misconduct.[175] Conversely, PPG's lawsuit against Transamerica "was based on Transamerica's alleged negligent failure to settle" the *Miller* action.[176] Thus, PPG's claim against Transamerica was not based on Transamerica's bad faith in breaching its contract with Solaglas.[177] Rather, PPG's claim focused on Transamerica's tortious failure to satisfy the duty required by the covenant of good faith and fair dealing.[178] As such, the court concluded that the public policy prohibiting the offset of liability damages by another's negligence would be violated if PPG were allowed to shift its obligation to pay the punitive damages awarded against Solaglas to Transamerica.[179]

2. *Punish and Deter By Way of Example*

The court next discussed the public policy of allowing punitive damages for the purposes of punishing the wrongdoer and deterring similar conduct in the future.[180] Again, the court was reluctant to permit a wrongdoer to shift its liability for intentional misconduct to its insurer.[181] To do so would not only pass the insurance company's increased costs to the public, but would also defeat the purpose for awarding punitive damages against a defendant.[182] The court stated that while compensatory damages are awarded to compensate a plaintiff for the injuries he sustained, punitive damages are awarded to punish and deter.[183] The court concluded that transferring PPG's bur-

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[175] *See id.* at 656.

[176] *Id.*

[177] *See id.*

[178] *See PPG*, 975 P.2d at 656.

[179] *See id.*

[180] *See id.* (citing CAL. CIV. CODE § 3294 (a) (Deering 1999) and Lira v. Shelter Ins. Co., 913 P.2d 514, 517 (Colo. 1996)). California statute provides that punitive damages are "damages for the sake of example and by way of punishing the defendant." CAL. CIV. CODE § 3294 (a) (Deering 1999).

[181] *See PPG*, 975 P.2d at 657.

[182] *See id.*

[183] *See id.* The court quoted Peterson v. Superior Court, 642 P.2d 1305, fn. 4 (Cal. 1982) (quoting Northwestern National Casualty Company v. McNulty, 307 F.2d 432,

den to pay punitive damages to Transamerica would violate this public policy.[184]

3. *Indemnification of Punitive Damages Prohibited*

Finally, the court addressed whether public policy allows an intentional wrongdoer to receive indemnification for punitive damages.[185] In concluding that it does not, the court briefly explained that the concept of indemnity obligates one party to reimburse another party for a sustained loss.[186] The court acknowledged the possibility that an insurance company's "own egregious misconduct may justify an award of punitive damages against it."[187] However, it found that there is no justification for holding an insurer liable for the insured's misconduct.[188] In the *Miller* action, a Colorado jury awarded punitive damages against Solaglas, not Transamerica, for its "morally reprehensible behavior in installing the windshield on the truck."[189] The court thus concluded that in this case, re-

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440-441 (5th Cir. 1962)): "The policy considerations in a state where, as in [California], punitive damages are awarded for punishment and deterrence, would seem to require that the damage rest ultimately as well as nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages are not intended to compensate the plaintiff for his injury, since compensatory damages have already made the plaintiff whole. . . ." *Id.*

[184] *See PPG*, 975 P.2d at 657.

[185] *See id.* (citing CAL. INS. CODE § 533 (Deering 1999). The court again noted that Colorado "has the same public policy." *Id.* (citing Lira v. Shelter Ins. Co., 913 P.2d 514, 517 (Colo. 1996)).

[186] *See id.* (quoting Rossmoor Sanitation, Inc. v. Pylon, Inc., 532 P.2d 97 (Cal. 1975)): "Indemnity, which may be express, implied, or equitable, is 'defined as the obligation resting on one party to make good a loss or damage another party has incurred.' " *Id.*

[187] *Id.* The court continued: "For example, if in addition to proving a breach of the implied covenant of good faith and fair dealing proximately causing actual damages, the insured proves by clear and convincing evidence that the insurance company itself engaged in conduct that is oppressive, fraudulent, or malicious, the insured may recover punitive damages from the insurance company...That issue is not present here." *Id.* (citing CAL. CIV. CODE § 3294 (a) (Deering 1999); Egan v. Mutual of Omaha, Ins., 620 P.2d 141 (Cal. 1979); and Silberg v. California Life Ins. Co., 521 P.2d 1103 (Cal. 1074)).

[188] *See id.* at 658.

[189] *PPG*, 975 P.2d at 658.

quiring Transamerica to reimburse PPG for the punitive damages awarded against Solaglas in the *Miller* action would violate the public policy prohibiting such indemnification.[190]

C. THE MAJORITY'S CONCLUSION

In keeping with the holdings of the high courts of other states, the California Supreme Court held that an insured cannot shift its liability for punitive damages arising out of a third party lawsuit to its insurance company.[191] This holds true when such damages are awarded against the insured "as a result of the insured's intentional, morally blameworthy behavior against the third party."[192] The court further concluded that allowing PPG to recover from Transamerica would violate public policy which also prohibits indemnification of punitive damages.[193] First, liability for intentional misconduct cannot be mitigated by another's negligence.[194] Second, punitive damages are intended to punish the wrongdoer and to deter similar conduct in the future.[195] Third, a wrongdoer cannot be indemnified for punitive damages.[196] Therefore, the California Supreme Court affirmed the Court of Appeal's judgment in favor of Transamerica.[197]

VI. JUSTICE MOSK'S DISSENT: THE MAJORITY FAVORS INSURERS

Justice Mosk was the sole dissenter from the majority's holding that PPG could not recover the punitive damages awarded against it as a result of Transamerica's tortious con-

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[190] *See id.*

[191] *See id.* (citing Lira v. Shelter Ins. Co., 913 P.2d 514 (Colo. 1996) and Soto v. State Farm Ins. Co., 635 N.E.2d 1222 (N.Y. 1994)).

[192] *Id.*

[193] *See id.*

[194] *See PPG*, 975 P.2d at 658.

[195] *See id.*

[196] *See id.*

[197] *See id.*

duct in failing to settle the *Miller* action. Instead, Justice Mosk argued in favor of a neutral application of the law and stood beside the California Civil Code's declaration that there is a remedy for every wrong.[198] Justice Mosk began his discussion by stating that in affirming the Court of Appeal's decision, the majority not only favored Transamerica over PPG, but also "favor[ed] all insurers over all their insureds."[199]

A. GOOD FAITH AND FAIR DEALING & THE INSURER'S DUTY TO DEFEND

Justice Mosk first addressed an insurer's duty to defend its insured pursuant to the implied covenant of good faith and fair dealing.[200] Essentially, an insurance policy is a contract in which the insurer "makes promises" to an insured in consideration for insurance premiums paid by the insured.[201] The terms of such policies impose a duty upon the insurer "to defend its insured against damages for a covered claim by a victim of the insured."[202] Should the insured become obligated to pay damages for a claim covered by the policy, the insurer also has the duty to reimburse, or indemnify, the insured up to the amount of coverage specified in the insurance policy.[203] Justice Mosk agreed with the majority that, as a matter of law, covered claims against an insured include compensatory damages, but generally do not include punitive damages, the purpose of which is "to punish the insured itself " for its own misconduct.[204] However, Justice Mosk recognized that implicit

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[198] *See* PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 663 (Cal. 1999) (Mosk, J., dissenting).

[199] *Id.* at 658.

[200] *See id.*

[201] *Id.*

[202] *Id.* (citing Buss v. Superior Court, 939 P.2d 766 (1997)).

[203] *See PPG* , 975 P.2d at 659 (Mosk, J., dissenting).

[204] *Id.* (relying on J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co., 59 Cal. App. 4th 6, 14 (1997) and CAL. INS. CODE § 533 (Deering 1999). Justice Mosk went on to say: "It has been stated: 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of . . . claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain

in both the insurance policy and in the insurer's duty to defend is the implied covenant of good faith and fair dealing which extends an insurer's duty to defend to include "a duty to make reasonable efforts to settle a claim against its insured by the insured's victim.[205] This obligation complies with California's public policy favoring settlement.[206] Consequently, in satisfying its duty to settle a claim, the insurer is obligated to "give at least as much weight to its insured's interests as to its own, and must act as though it alone would have to bear any ensuing judgment."[207]

Next, Justice Mosk asserted that, contrary to the majority's argument, there is no prohibition against an insurer offering to settle for an amount that would avoid both compensatory and punitive damages.[208] If such a rule did exist, insurers would be prevented from offering any amount at all for any claim alleging fraudulent or malicious misconduct that could potentially result in punitive damages at trial.[209] However, Justice Mosk argued that while such claims are simple to allege in a complaint, they may in fact be difficult to prove; thus, one cannot "predict with any confidence what any given trier of fact may find in the premises."[210]

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indemnity for possible liability. As a consequence, California courts have been consistently solicitous of insureds' expectations on this score.' This is true when the insured is an individual man or woman. It is also true when the insured is a business entity. Indeed, the functioning of a free and open market in contemporary society demands no less." *PPG*, 975 P.2d at 659 (Mosk, J., dissenting) (citing Montrose Chemical Corp. v. Superior Court, 861 P.2d 1153 (Cal. 1993)).

[205] *Id.* at 659. *See, e.g.,* Murphy v. Allstate Ins. Co., 553 P.2d 584 (Cal. 1976); Johansen v. California State Auto. Assn. Inter-Ins. Bureau, 538 P.2d 744 (Cal. 1975); and Crisci v. Security Ins. Co., 426 P.2d 173 (Cal. 1967).

[206] *See PPG*, 975 P.2d at 659 (Mosk, J., dissenting). *See, e.g.,* Coleman v. Gulf Ins. Group, 718 P.2d 77 (Cal. 1986) (Bird, J., dissenting). Justice Mosk emphasized that "the insurer's duty to settle arises from its interrelated duty to defend." *PPG*, 975 P.2d at 659 (Mosk, J., dissenting). *See, e.g.,* Comunale v. Traders & General Ins. Co., 328 P.2d 198 (Cal. 1958).

[207] *PPG*, 975 P.2d at 659 (Mosk, J., dissenting).

[208] *See id.*

[209] *See id.* at 660. Justice Mosk did not explain why or how this would happen.

[210] *Id.*

Justice Mosk further characterized an insurer's wrongful failure to settle a third party claim against its insured as a breach of its duty.[211] Upon this breach, the insurer has committed a tort against the insured, thereby making it liable for any injuries proximately caused by its misconduct.[212] According to Justice Mosk, these injuries can include "any sums that [an] insured became legally obligated to pay its victim as damages for its claim."[213] Because indemnification encompasses mandatory payment pursuant to the terms of the actual insurance policy, the damages proximately resulting from the insurer's failure to settle "do not constitute indemnification."[214] Thus, the amount of the insurer's liability for its breach is not affected "by any limits on indemnification specified in any liability insurance policy."[215] Therefore, an insurer that breaches its duty to settle a third party claim against its insured is liable to its insured for any resulting damages, namely the amount of compensatory *and* punitive damages that "its insured became legally obligated to pay" the third party.[216] Any other result, Justice Mosk concluded, would leave the insured without a complete remedy for the injury suffered due to the insurer's misconduct.[217]

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[211] *See id.*

[212] *See PPG*, 975 P.2d at 658 (Mosk, J., dissenting).

[213] *Id.* at 660.

[214] *Id.* Justice Mosk further asserted that "section 2772 of the Civil Code makes plain [that indemnification] comprises payment that is required under the terms of a liability insurance policy itself. Rather, as the very name declares, they are damages, which comprise payment that is compelled by law. The 'principles' that operate here are 'fundamental in our jurisprudence.' " *Id.* (citing Crisci v. Security Ins. Co. 426 P.2d 173 (1967)). "Section 3523 of the Civil Code sets out as a maxim of jurisprudence, in the nature of public policy, that 'for every wrong there is a remedy.' Section 3274 of the Civil Code implies that the 'remedy' for a tort is generally 'compensation.' For its part, section 3281 of the Civil Code implies that compensation for a tort is 'in money, which is called damages.' Lastly, section 3333 of the Civil Code states that the 'measure of damages' for a tort is generally the 'amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.'" *Id.*

[215] *Id.*

[216] *Id.* at 661.

[217] *See PPG*, 975 P.2d at 661 (Mosk, J., dissenting).

B. ATTACKING THE MAJORITY'S PROXIMATE CAUSE ARGUMENT

Justice Mosk next addressed the majority's reliance on the negligence-based notion of proximate cause in rendering its decision against PPG.[218] He noted that while the majority relied on case law which suggests that proximate cause incorporates public policy considerations, it neglected to mention that "such considerations are those that would make it 'unjust to hold' the actor 'legally responsible.' "[219] Justice Mosk concluded that no considerations existed in this case that would make it unjust to hold Transamerica legally responsible since PPG would have no obligation to pay damages in the *Miller* action had Transamerica fulfilled its duty to settle the action in the first place.[220]

C. THE MAJORITY'S PUBLIC POLICY ARGUMENTS DO NOT "BEAR ANY PERSUASIVE FORCE"

Justice Mosk continued his criticism of the majority's opinion by attacking its reliance on public policy arguments to support its affirmation of the lower court's opinion against PPG.[221] Before addressing each policy argument, however, Justice Mosk began by asserting that none of the policy arguments presented by the majority "proves to bear any persuasive force."[222]

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[218] *See id.*

[219] *Id.* Justice Mosk stated that "[the majority] quote[s] the observation of then Justice Traynor, that proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of [public] policy that limit an actor's responsibility for the consequences of his conduct.' " *Id.* (quoting Mosley v. Arden Farms Co., 157 P.2d 372 (1945) (Traynor, J., concurring)). "But they fail to quote *Witkin's*, that such considerations are those that would make it 'unjust to hold' that actor 'legally responsible.' " *Id.* (quoting 6 WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS § 968 (9th ed. 1988)). "Considerations of this sort are altogether absent here." *Id.*

[220] *See id.*

[221] *See id.*

[222] *PPG*, 975 P.2d at 661.

1. *One's Liability Cannot Be Offset by Negligence of Another*

Justice Mosk first addressed the majority's assertion that the public policy prohibiting the offset of liability damages by another's negligence would be violated if PPG was allowed to shift to Transamerica its obligation to pay the punitive damages awarded against Solaglas.[223] Justice Mosk contended that such a public policy would not even be implicated, let alone violated.[224] The public policy at issue does not, as the majority claimed, operate "by comparing the relative culpability of the defendants in two separate actions."[225] Rather, the public policy operates "by comparing the relative culpability of the plaintiff and the defendant within a single action."[226] Thus, the California Civil Code's declaration that there is a remedy for every wrong applies to Solaglas' wrong against Miller as well as to Transamerica's wrong against Solaglas and PPG.[227]

2. *Punish and Deter By Way of Example*

Justice Mosk next addressed the majority's contention that allowing PPG to transfer to Transamerica its obligation to pay punitive damages in the *Miller* action would violate the public policy that allows an award of punitive damages for the purpose of punishing the wrongdoer and deterring similar conduct in the future.[228] However, Justice Mosk argued that subjecting an insurer to such liability for breaching its duties to its insured is not inconsistent with either the deterrence or punish-

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[223] *See id.*

[224] *See id.*

[225] *Id.* Justice Mosk continued, "[F]or example, the culpability of the insured in an action brought against it by its victim for bodily injury and property damage vis-à-vis the culpability of the insurer in an action brought against it by its insured for tortious breach of its duty to settle." *Id.*

[226] *Id.* Justice Mosk continued, "[F]or example, the culpability of the insured's victim vis-à-vis the culpability of the insured itself in an action brought by the former against the latter for bodily injury and property damage." *Id.*

[227] *See PPG,* 975 P.2d at 661 (Mosk, J., dissenting).

[228] *See id.* at 661-62.

ment aspects of the policy.[229] First, Justice Mosk contended that there is no conduct to deter since it is implausible that PPG or Solaglas would be tempted to engage in wrongful conduct in the future hoping that Transamerica might breach its duty to settle and therefore become liable to Solaglas or PPG for damages.[230] Second, any liability imposed on the insurer would be limited to "the insured's out-of-pocket costs attributable to the payment of punitive damages" and would not extend to "various related opportunity and transaction costs."[231] Both opportunity and transaction costs tend to be substantial since several years often pass between the time an insured satisfies its obligation to pay punitive damages and the time the insurer actually compensates the insured for the payment.[232] Further, transaction costs encompass both the "'monetary costs of the litigation' itself" and "'the toll the litigation takes' on the insured."[233]

3. Indemnification of Punitive Damages Prohibited

Finally, Justice Mosk addressed the majority's contention that imposing liability upon an insurer to indemnify the insured for punitive damages is prohibited by the public policy forbidding indemnification of punitive damages.[234] Justice Mosk argued that like the first public policy, the policy against indemnification of punitive damages would not be violated because it would not be implicated.[235] Even if the public policy was in question, it would not be implicated any more than the policy favoring settlement of the underlying third party claim by the insurer.[236] In this situation, the payment made by the insurer does not constitute indemnification since it comprises

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[229] *See id.* at 662.

[230] *See id.*

[231] *Id.*

[232] *See PPG*, 975 P.2d at 662 (Mosk, J., dissenting).

[233] *Id.* (quoting Grimm v. Leinart, 705 F.2d 179, 183, n.4 (6th Cir. 1983)).

[234] *See id.*

[235] *See id.*

[236] *See id.*

damages compelled by law as opposed to a required payment pursuant to the terms of the insurance policy itself.[237] In other words, compelling such a payment by Transamerica to PPG ensures that PPG will be compensated for the loss it incurred as a result of Transamerica's breach.[238] Thus, just as there is no policy prohibiting an insurer from making a settlement payment to avoid punitive damages in the first place, there is no policy prohibiting an insurer from making payment to the insured to "make up for punitive damages" awarded against it.[239]

D. PUBLIC POLICY ACTUALLY FAVORS INSURER LIABILITY FOR PUNITIVE DAMAGES

In contrast to the majority's reasoning that various public policy considerations preclude the imposition of liability upon an insurer for punitive damages awarded against its insured, Justice Mosk argued that "public policies favoring settlement and making a wrongdoer remedy its wrong" contradict the majority's conclusion.[240] Further, the failure to impose such liability upon the insurer invites adverse consequences that clearly violate public policy.[241] It is well established that an insurer has a duty to settle.[242] In satisfying this duty, the insurer must give, at a minimum, equal weight to its own and its insured's interests.[243] The insurer must also "act as though it alone would have to bear any ensuing judgment."[244] However, knowing that it will not be held liable for any punitive damages awarded against its insured may compel an insurer to breach its duty to settle when a third party claim against its insured pleads little compensatory damages, but high punitive

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[237] *See PPG*, 975 P.2d at 662 (Mosk, J., dissenting).

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *See id.*

[242] *See PPG*, 975 P.2d at 662 (Mosk, J., dissenting).

[243] *See id.*

[244] *Id.*

damages.[245] Thus, the insurer would be unjustly enriched while its insured is left to bear the costs of its insurer's breach.[246] In essence, "the insurer would receive real premiums in consideration for an empty promise, and would also avoid any payment in settlement."[247] As a result, the insured would bear both the threat of loss and the actual loss that a settlement by the insurer would have prevented.[248]

On the other hand, if an insurer can be held liable for punitive damages awarded against its insured, it would be encouraged to satisfy its duty to settle since the insurer would stand to lose as much as the insured.[249] The insurer would thus be liable for breach of its duty to settle, adequately providing its insured with a remedy.[250] Justice Mosk argued that such a result would not diminish the impact or the purpose of punitive damages to punish and deter.[251] Rather, as already pointed out by Justice Mosk, both punishment and deterrence remain "in the form of opportunity and transaction costs."[252]

E. THE DISSENT'S CONCLUSION

In his dissent, Justice Mosk concluded that the majority should have "simply allow[ed] the law to operate in a neutral fashion."[253] An insurer must satisfy its duty to settle regardless of whether it is faced with compensatory or punitive damages.[254] Further, just as there is a remedy for the wrong a third party suffers as a result of the insured's misconduct, there is a remedy for the wrong an insured suffers as a result

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[245] *See id.*

[246] *See id.* at 663.

[247] *PPG*, 975 P.2d at 663 (Mosk, J., dissenting).

[248] *See id.*

[249] *See id.*

[250] *See id.*

[251] *See id.*

[252] *PPG*, 975 P.2d at 663 (Mosk., J., dissenting).

[253] *Id.*

[254] *See id.*

of the insurer's misconduct.[255] For these reasons, Justice Mosk dissented, stating simply that he could not, as did the majority, "favor all insurers over their insureds on the issue of punitive damages."[256]

VII. CRITIQUE: THE MAJORITY IGNORED THE ISSUE

In ruling against PPG, the California Supreme Court ignored the merits of PPG's arguments. PPG never disputed that California's public policy prohibits indemnification by an insurer of punitive damages awarded against its insured in a third party action.[257] Rather, PPG contended that this public policy was not applicable to the case at hand.[258] PPG argued that it was not seeking indemnification from Transamerica for the punitive damages awarded against it in the *Miller* action.[259] Instead, PPG sought recovery for the damages that Transamerica caused it to suffer in engaging in tortious conduct during settlement negotiations.[260] At issue, then, was not California's public policy prohibiting indemnification of punitive damages, but rather its public policy recognizing that a tortfeasor is responsible for damages resulting directly from its misconduct.[261] In each of their respective decisions, however, the trial court, the Court of Appeal, and the Supreme Court ignored these important policies.

A. PPG SOUGHT RECOVERY FROM A TORTFEASOR, NOT INDEMNIFICATION FROM AN INSURER

In affirming the Court of Appeal's decision, the California Supreme Court relied heavily on its assertion that public policy demands that wrongdoers pay for the consequences of their

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[255] *See id.* (citing CAL. CIV. CODE § 3523 (Deering 1999)).

[256] *Id.*

[257] *See* Petitioner's Brief, *supra* note 72, at 5.

[258] *See id.*

[259] *See* PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 655 (Cal. 1999).

[260] *See* Petitioner's Brief, *supra* note 72, at 4.

[261] *See id.*

actions.[262] In doing so, the court effectively relieved Transamerica of liability for its tortious conduct in failing to settle the underlying claim. Both the Court of Appeal and the Supreme Court based their decisions on the idea that such a policy "cannot be undermined by passing the damages on to an insurer, even one who has acted unreasonably."[263] As PPG pointed out in its brief, however, forty years of California case law suggests the contrary.[264]

In California, "an insured should be made whole after an insurance carrier breaches its duties towards its insured."[265] Upon a breach, the insurer is liable for any resulting consequential damages whether or not the expenses are covered by the policy, including such damages as lost profits, medical expenses, and attorneys' fees.[266] In this case, Transamerica breached its duty to settle by refusing to accept any of Miller's settlement offers despite its knowledge that PPG risked suffering a large adverse judgment.[267] As a consequence of its breach, Transamerica should have been compelled to pay for all damages that were the result thereof, including a punitive damages award. As PPG noted in its brief, "[Transamerica] should pay [for the punitive damages] not because they are insured by the policy, but because they were caused by its own separate tortious act. Such a result would promote, not infringe upon, California's public policy."[268]

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[262] *See PPG*, 975 P.2d at 656.

[263] PPG Indus., Inc. v. Transamerica Ins. Co., 56 Cal. Rptr. 2d 889, 891 (Cal. Ct. App. 1996).

[264] *See* Petitioner's Brief, *supra* note 72, at 14.

[265] *Id.* (citing Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 925 (1978)).

[266] *See* Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433 (1967) (upholding damages awarded to plaintiff for mental suffering resulting from insurer's tortious conduct).

[267] *See* Petitioner's Brief, *supra* note 72, at 4.

[268] *Id.* at 17.

B. THE COURT DISREGARDED CALIFORNIA LAW FAVORING THE SETTLEMENT OF LAWSUITS

In its brief to the Supreme Court, PPG clearly stated that California case law favors settlements in litigation, especially in situations where an insurer tenders the defense of its insured in a third party lawsuit.[269] When such a situation arises, the implied covenant of good faith and fair dealing mandates that an insurer settle a third party action against its insured within policy limits when it is likely that a judgment will exceed the covered amount.[270] When the insurer does not attempt to reasonably settle and an excess judgment is rendered against the insured, the excess is a consequence of the insurer's wrongful act.[271] Thus, the insurer becomes liable in tort to the insured for the excess judgment and must pay for all damages resulting therefrom.[272] Whether or not the excess judgment is covered by the insurance policy or is even insurable is irrelevant. The only issue is whether the excess judgment "was a *consequence of the insurance carrier's breach* of its duty to settle."[273] In this case, it was.

C. POLICY DOES NOT PRECLUDE SETTLING LAWSUITS THAT INCLUDE PUNITIVE DAMAGES

Another important point PPG advanced in its brief to the court is that "California public policy does not prohibit a party from settling a lawsuit that includes punitive damages."[274] A settlement within policy limits avoids the possibility of an excess judgment at all, whether or not punitive damages are included in the judgment. To contend otherwise suggests that

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[269] *See id.* at 6.

[270] *See supra* notes 6 - 70 and accompanying text.

[271] *See* Petitioner's Brief, *supra* note 72, at 7.

[272] *See id.* (citing Crisci v. Security Ins. Co., 66 Cal. 2d 425, 429 (1967) and Brandt v. Superior Court, 37 Cal. 3d 813 (1985)).

[273] Petitioner's Brief, *supra* note 72, at 7.

[274] *Id.* at 8.

those who settle avoid being punished for their misconduct. As the dissent recognized in *Lira v. Shelter Insurance Co.*:[275]

> No party suggests that public policy precludes the settlement of a punitive damages claim that results in insulation of an insured from liability for such damages. This being the case, when such a settlement is not achieved as a consequence of bad faith breach of an insurer's duty of good faith and fair dealing, there is no reason that the insurer should not bear the consequences of a resulting punitive damages award against its insured. Indeed, such a result promotes the public policy of encouraging good faith and fair dealing by insurers, who control the defense of actions brought against their insureds.[276]

Here, by breaching its duty to settle, Transamerica became the wrongdoer. PPG would not have suffered the excess judgment but for Transamerica's failure to honor its duty. By not compelling Transamerica to compensate PPG for the punitive damages judgment, the court allowed Transamerica to escape liability for its bad faith.[277] In the same breath that it condemned PPG for its alleged attempt to avoid the consequences of its wrongful act, the court permitted Transamerica to do so. In so doing, the court gave insurers "no incentive to fulfill their obligations to their insureds," but instead gave them the option to force insureds to take risky third party cases to trial.[278] California's public policy is certainly not furthered by such an outcome.

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[275] 913 P.2d 514 (Colo. 1996).

[276] Petitioner's Brief, *supra* note 72, at 9 (quoting Lira v. Shelter Insurance Co., 913 P.2d 514, 521 (Colo. 1996)).

[277] *See id.* at 13.

[278] *Id.*

D. FORCING AN INSURER TO PAY THE CONSEQUENTIAL DAMAGES OF ITS WRONGFUL CONDUCT DOES NOT PUT IT IN A NO-WIN SITUATION

Concededly, distinguishing between indemnification for punitive damages and recovery for consequential damages, as suggested by Justice Mosk in his dissent, seems to put the insurer in a no-win situation. On one hand, it seems there is no harm to the insured if the insurer fails to settle, but no punitive damages are ultimately awarded. In this situation, the entire judgment, presuming it is within policy limits, will be covered by the policy. On the other hand, if punitive damages, which are not usually covered by insurance policies, are ultimately awarded, the insured can recover on the theory that the insurer failed to settle. In both circumstances, the insurer becomes liable for the entire third party judgment. Thus, upon initial review, it seems that the insurer would forever be responsible for punitive damages awarded against its insured, except where there is a settlement demand greater than policy limits.

However, the above scenario incorrectly suggests that, under Justice Mosk's analysis, an insurer that seeks to avoid the threat of punitive damages against its insured must essentially settle for any amount within policy limits. Yet, if an insurer accepts or attempts to accept a reasonable settlement offer of a covered claim in circumstances where a judgment in excess of policy limits is likely, it will have fulfilled its duty to the insured and would not be liable for damages.[279] As PPG argued in its brief to the court, when an excess judgment is imminent, the possibility of punitive damages does not need to be considered in settlement negotiations.[280] PPG argued that "if Transamerica simply had fulfilled its duties *without even considering* the punitive damage threat against PPG, PPG would not have faced a punitive damages judgment."[281] Thus,

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[279] *See* Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 201 (Cal. 1958).

[280] *See* Petitioner's Brief, *supra* note 72, at 9.

[281] *Id.*

the insurer must simply give at least equal weight to its insured's interests, as the law requires it to do.[282]

Furthermore, if an insured is likely to face an excess judgment, whether punitive damages or not, an insurer should make all reasonable attempts to settle the claim within policy limits.[283] The insurer is not authorized to gamble with its insured's money, as Transamerica seems to have done here. An insurer should not be able to pursue litigation merely because the possible excess judgment includes punitive damages.[284] As Justice Mosk noted, the insurer must "act as though it alone would have to bear any ensuing judgment."[285] Clearly, Transamerica failed to fulfill this duty when it repeatedly refused to settle the *Miller* lawsuit.[286] In fact, Transamerica failed to settle even after a jury found in favor of Miller in the first lawsuit.[287] In so doing, Transamerica breached its duty to settle and became liable for any consequential damages arising therefrom. The type of damages ultimately incurred is of no consequence. Here, PPG suffered a one million dollar punitive damages judgment as a result of Transamerica's tortious conduct. As such, PPG was entitled to recover. Had Transamerica demonstrated reasonable attempts to settle the *Miller* action within policy limits, it would have fulfilled its duty to PPG. Thus, whether or not settlement negotiations proved successful, any excess judgment incurred by PPG would not have been caused by Transamerica. Therefore, any resulting judgment would not be classified as consequential damages and, thus, would not be recoverable by PPG.

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[282] *See Comunale,* 328 P.2d at 201.

[283] *See* WINDT, *supra* note 1, §5.12, at 324.

[284] *See PPG,* 975 P.2d at 662 (Mosk, J., dissenting).

[285] *Id.*

[286] *See supra* notes 169 – 190 and accompanying text.

[287] *See id.*

VIII. CONCLUSION

The California Supreme Court's holding in *PPG Industries, Inc. v. Transamerica Insurance Co.* imposes a tremendous hardship on insureds who have been wronged by their insurers. While the court correctly states California's policy against indemnification of punitive damages, a fact that PPG conceded to in its brief to the court, it incorrectly applied that policy in this case. As Justice Mosk acknowledged in his dissenting opinion, imposition of damages pursuant to law is not the equivalent of indemnification under an insurance policy.[288] PPG was entitled to recover for the damages it suffered as a result of Transamerica's breach of the implied covenant of good faith and fair dealing, regardless of whether the recoverable damages were equal in amount to the punitive damages awarded in the *Miller* lawsuit. There is a difference between holding an insurer responsible for an insured's liability for punitive damages and holding an insurer responsible for its own wrong. While an insurer indeed should not be forced to bear the burden of its insured's wrong, neither should it be allowed to escape liability for its own wrong merely because the defining law is murky. By holding otherwise, the California Supreme Court has not only excused insurers from liability for their tortious conduct in defending their insureds whenever punitive damages are involved, but has also endorsed it.

Jennifer A. Emmaneel[*]

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[288] PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 662 (Cal. 1999) (Mosk, J., dissenting).

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