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DAMAGES FOR MENTAL SUFFERING CAUSED BY INSURERS: RECENT DEVELOPMENTS IN THE LAW OF TORT AND CONTRACT

I. Introduction

In the past, insurers have been virtually immune from liability for the mental suffering caused by their more extreme settlement tactics.¹ However, several recent decisions have indicated a trend toward holding an insurer liable for such mental injury. These decisions attest to the fact that the law of liability for the infliction of mental suffering is still in a process of expansion.² There is a definite tendency today to give increased protection to the interest in one's peace of mind.³ This movement has developed chiefly in the law of tort. However, in the area of insurance contracts, the development has also involved some change in the law of contract. This trend, together with the increased concern for the consumer, serves as a warning to insurers that outrageous settlement practices will lead to harsh reprisals. This new vulnerability and the decisions which have established it are the subject of this note.

II. Insurer's Liability for Mental Distress

A. *Crisci*: Foreseeability

Although the "general rule" is that in breach of contract actions damages for mental suffering are not allowed,⁴ a distinction is made between two classes of contracts. Most contracts are commercial in nature, having as their dominant purpose the promotion of a pecuniary interest. In this type of contract the courts will uniformly deny recovery for mental suffering caused by the loss of the bargain.⁵ However, when the primary interest infringed upon by the breach is not pecuniary but rather personal in nature, other policies come into play and relief

1 Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.
RESTATEMENT (SECOND) OF TORTS § 46, comment j at 77 (1965); see Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 43 (1956).

2 11 W. WILLISTON, CONTRACTS § 1341, at 219-20 (3d ed. 1968). American Jurisprudence comments that: "Some learned text writers are of the opinion that legal protection to the interest in mental and emotional tranquility is in an intermediate state of development." 52 AM. JUR. TORTS § 46, at 391 (1944). See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 50, 52 (4th ed. 1971), references collected *id.* n. 27, n. 50; RESTATEMENT (SECOND) OF TORTS § 46, comment c at 72 (1965); *id.* Reporter's Note at 48; 1 HARPER & JAMES, THE LAW OF TORTS § 9.1, at 667-68 (1956); Annot., 64 A.L.R. 2d 100, 119-20 (1959); Prosser, *Insult and Outrage*, *supra* note 1 at 40, and references collected *id.* n.1.

3 See Kaufman v. Western Union Tel. Co., 224 F.2d 723, 728-29 (5th Cir.), *cert. denied*, 350 U.S. 947 (1955).

4 *E.g.*, Robinson v. Western Union Tel. Co., 24 Ky. L. Rptr. 452, 68 S.W. 656 (1902), Aaron v. Ward, 203 N.Y. 351, 354, 96 N.E. 736 (1911). C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 145, at 592 (1935). See 5 A. CORBIN, CONTRACTS § 1076, at 426 (1964); 11 W. WILLISTON, CONTRACTS § 1341, at 214 (3d ed. 1968).

5 *E.g.*, Wachtel v. Nat'l Alfalfa Journal Co., 190 Iowa 1293, 176 N.W. 801 (1920). A contestant in a magazine contest could not recover for mental suffering when the contest was discontinued. C. MCCORMICK, *supra* note 4 at 592-93. See 5 A. CORBIN, CONTRACTS § 1076, at 426 (1964); 11 W. WILLISTON, CONTRACTS at 214 (3d ed. 1968).

for mental suffering is allowed.⁶ The most common types of contract in the latter category have been contracts to marry, contracts of carriers and innkeepers with passengers and guests, contracts for the disposition of dead bodies, and contracts for the delivery of death messages.⁷ The element common to all of these cases and other "personal" actions is that they are all cases in which "personal feelings are most deeply involved and in which mental suffering is likely to be most poignant."⁸

Historically, the courts have viewed an insurance contract as being "commercial" rather than "personal" in nature and thus damages for mental suffering have been disallowed.⁹ It is generally felt that by contracting for insurance one is seeking to gain only pecuniary benefits and any mental suffering resulting from breach is considered not "reasonably foreseeable."

In 1967, however, insurance contracts were for the first time considered "personal" in nature. *Crisci v. Security Insurance Co.*¹⁰ was the first case which allowed recovery against an insurer for mental suffering as an incident of damages.¹¹ Mrs. Crisci had a liability insurance policy of \$10,000 covering her apartment building. One of her tenants was injured on a stairway and filed a personal injury suit against her for \$400,000. The defendant insurance company had an opportunity to settle for \$9,000, but failed to do so, even though it was aware that the tenant was likely to recover a verdict of at least \$100,000. The suit went to trial, and the tenant was awarded \$101,000 judgment against Mrs. Crisci. Mrs. Crisci, faced with a judgment of \$91,000 in excess of her coverage, became extremely indigent. The change in her financial condition resulted in a decline in her physical health which led to hysteria and several suicide attempts. She brought suit against the insurance company for wrongfully refusing to settle within policy limits.

The court allowed recovery for mental suffering as an "aggravation of damages."¹² It held "that a plaintiff who as a result of a defendant's tortious conduct loses his property and suffers mental distress may recover not only for the pecuniary loss but also for his mental distress."¹³ While the foreseeability limitation would preclude recovery for mental suffering in a "commercial" contract, the court found liability insurance contracts to be "personal" in nature,

6 RESTATEMENT OF CONTRACTS § 341 (1932):

In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach was . . . of a contract to render a performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss.

7 5 A. GORBIN, CONTRACTS § 1076, at 429 (1964).

8 *Id.*

9 The traditional measure of contract damages limits recovery, in the normal situation, to policy benefits plus interest. *New Orleans Ins. Ass'n v. Piaggio*, 83 U.S. (16 Wall.) 378 (1872). Where consequential damages are sought the limitations of *Hadley v. Baxendale* control. Comment, *Damages Assessed Against Insurer for Wrongful Failure to Pay*. 10 Wm. & MARY L. REV. 466, 467 (1968).

10 66 Cal.2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

11 Comment, *An Insurance Company's Duty to Settle: Qualified or Absolute?*, 41 So. CALIF. L. REV. 120 (1968).

12 66 Cal.2d at 433-34, 426 P.2d at 179, 58 Cal. Rptr. at 19.

13 *Id.*

and thus damages for mental suffering were foreseeable. The court explained that liability insurance contracts are "personal" in that:

. . . plaintiff did not seek by the contract involved here to obtain a commercial advantage but to protect herself against the risks of accidental losses, including the mental distress which might follow from the losses. Among the considerations in purchasing liability insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss, . . . recovery of damages for mental suffering has been permitted for breach of contracts which directly concern the comfort, happiness or personal esteem of one of the parties.¹⁴

Thus the court in *Crisci* found an insurer's breach of contract to be a sufficient basis upon which to allow damages for mental suffering. Further, the court firmly placed liability insurance contracts within the category of contracts which have been held to "directly concern the comfort, happiness or personal esteem of one of the parties"¹⁵ (*i.e.*, "personal" contracts).

B. *Fletcher*: Outrageous Conduct

Historically, the intentional infliction of mental distress was not itself deemed to be a sufficient basis for an action in tort.¹⁶ All remedy for mental injury was refused unless it could be brought within the context of some already recognized tort. A plaintiff would have to find some independent tort to serve as a peg upon which to hang his mental damage.¹⁷ The independent cause of action can be other than a tort claim. In certain cases, as previously discussed,¹⁸ a breach of contract can create a right to recover for mental suffering. However, the *Hadley* rule strictly limits the possibility of such "parasitic" damages. It was only with *Crisci* that insurance contracts were added to those contracts for which damage for mental suffering is deemed foreseeable.

It was only in the 1930's that the intentioned infliction of mental distress, at least by extreme and outrageous conduct, began to be recognized as a cause of action in itself.¹⁹ Since that time the tort has been more fully developed and its application has been expanded to protect one's peace of mind in many areas.²⁰ Today it appears to be quite generally recognized as a separate tort.²¹

Inherent in the elements of this tort are limitations as to when the "new tort" is applicable.²² The first limitation which has emerged from the cases is

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 51-52 (4th ed. 1971); Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 42-43 (1956).

¹⁷ W. PROSSER, HANDBOOK OF THE LAW OF TORTS *supra* note 16 at 52.

¹⁸ See text accompanying notes 6-8 *supra*.

¹⁹ W. PROSSER, *supra* note 16 at 56; Prosser, *supra* note 16 at 43.

²⁰ W. PROSSER, *supra* note 16 § 12.

²¹ *Id.* at 52; Prosser, *Insult and Outrage*, *supra* note 16 at 40-44. RESTATEMENT (SECOND) OF TORTS § 46 (1965) states:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

²² The elements as set out in *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App.3d 376, 395, 89 Cal. Rptr. 78, 88 (1970) are:

that the defendant's conduct must be extreme and outrageous.²³ While a defendant's acts in themselves may not be extreme and outrageous,²⁴ there are other factors to be considered. Both the Restatement and Prosser point to two factors, either of which, if present, makes a defendant's acts more susceptible to a finding of outrageousness. The first factor is set forth in the Restatement as follows:

The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.²⁵

It is because of their position of power that the more extreme methods of collection agencies and other creditors have been found to be outrageous.²⁶ Such misuse of one's position of power involves behavior which resembles extortion. There have been indications that bullying tactics of insurance adjusters trying to force a settlement may come under the "new tort."²⁷

The second factor which makes a defendant's behavior particularly susceptible to a finding of outrageousness is described in the Restatement as follows:

The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to the emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.²⁸

The essential element of the outrage is the defendant's awareness of the victim's vulnerability.²⁹ There have been a number of decisions in which sick people and children have recovered for conduct which, except for the fact that the defendant was aware of plaintiff's condition, would not in itself be labelled

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- (1) Outrageous conduct by the defendant;
 - (2) The defendant's intention of causing, or reckless disregard of the probability of emotional distress;
 - (3) The plaintiff's suffering severe or extreme emotional distress; and
 - (4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

See, RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

²³ W. PROSSER, *supra* note 16 at 56; Prosser, *supra* note 16 at 43-44.

²⁴ In *Wilkinson v. Downton*, [1897] 2 Q.B.D. 57, defendant spread rumors that the plaintiff's son had hanged himself. In *State Rubbish Collectors Assn. v. Siliznoff*, 38 Cal.2d 330, 240 P. 2d 282 (1952) an association of rubbish collectors threatened to beat the plaintiff up, destroy his truck and put him out of business, unless he paid over proceeds from a territory which they had allocated to one of their members.

²⁵ RESTATEMENT (SECOND) OF TORTS § 46, comment e (1965). See W. PROSSER *supra* note 16 at 56-58; Prosser, *supra* note 16 at 48-50.

²⁶ Such methods include:

- . . . violent cursing, abuse, and accusations of dishonesty, through a series of letters
- . . . which repeatedly threaten arrest, ruination of credit, or a suit which is never brought, or telephone calls around the clock, or attempts to pile up the pressure by involving the plaintiff's employer, his relatives, his neighbors or the public in the controversy

W. PROSSER, *supra* note 16 at 57; Prosser, *supra* note 16 at 48.

²⁷ Prosser, *supra* note 16 at 49. See cases *id.* at n.50.

²⁸ RESTATEMENT (SECOND) OF TORTS § 46, comment f at 75 (1965). See W. PROSSER, *supra* note 16 at 58; Prosser, *supra* note 16 at 50-51.

²⁹ Prosser, *supra* note 16 at 50.

extreme or outrageous.³⁰ An illustrative case is *Clark v. Associated Retail Credit Men of Washington, D.C.*³¹ In that case defendant used comparatively mild, and arguably justified, threats in its efforts to collect a debt. However, the defendant was aware of the fact that plaintiff was suffering from arterial hypertension which threatened his eyesight. Nevertheless, defendant continued with the collection attempts. The defendant's awareness of the debtor's health was the factor which converted what was but a moderately aggressive attempt at collection into outrageous conduct.

While the requirement of extreme and outrageous conduct limits the types of cases to which the "new tort" can apply, there have been some indications that liability might be found because of an insurer's high-pressure settlement methods. Two comparatively recent cases have taken some initiative in establishing an insurer's liability for the intentional infliction of mental distress.

In 1970 *Fletcher v. Western National Life Insurance Co.*³² became the first case to make use of the "new tort" in an insurance context.³³ In this case the plaintiff was the victim of an industrial accident which resulted in an injury to his back. He was eventually placed on disability and fired from his job. The plaintiff was examined by many doctors. There was virtually unanimous agreement that the disability was caused by the industrial accident. Despite all the medical reports to the contrary, the insurer's claims manager concluded that the claim was one for sickness alone and not for injury.³⁴

Later, based upon one doctor's opinion that the plaintiff's disability was partially caused by a preexisting congenital defect, the defendant wrote the plaintiff that an "intensive investigation" had revealed that the plaintiff had made a misrepresentation in acquiring the policy and that the benefits already received would have to be returned. In subsequent communications, the defendant suggested a settlement of the alleged dispute which would allow the plaintiff to retain the benefits already received, but would release the insurer from all liability. The defendant's actions caused plaintiff worry and concern over the implied threats of a lawsuit, and the many misfortunes that might befall himself and his family because of the withholding of benefit payments.

The California Court of Appeals held that the defendant, without probable cause for believing that the plaintiff's disability was due to anything other than his work injury, engaged in concerted conduct to induce the plaintiff to surrender his policy by means of false and threatening letters and that the insurer, with malice and in bad faith, refused to pay the plaintiff's legitimate claim.³⁵ The court's finding of outrageous conduct was not based on the defendant's acts alone. Other factors were considered, one of which was the insurance company's

30 W. PROSSER, *supra* note 16 at 58. See *id.* nn.5, 6 & 7 for cases; Prosser, *supra* note 16 at 50-51.

31 70 U.S. App. D.C. 183, 105 F.2d 62 (1939).

32 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

33 Comment, 47 WASH. L. REV. 489, 492 (1972); Comment, 7 CALIF. W. L. REV. 496, 502 (1971).

34 The policy provided for payment of \$150.00 per month for a maximum of two years in the event of sickness, and for a maximum period of thirty years in the event of an accident. The insurer's liability would be greatly reduced by a finding of sickness rather than accident.

35 *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 393, 89 Cal. Rptr. 78, 87 (1970).

position of power. The insurer misused its position in a manner more subtle than the traditional methods used by creditors.³⁶

A second factor which the court considered was the defendant's knowledge of plaintiff's unusual susceptibilities. As in *Clark*,³⁷ the defendants in *Fletcher* were aware that plaintiff suffered from a serious injury. Yet in *Fletcher* it was not so much the back injury which rendered plaintiff susceptible to mental distress as it was the resultant inability to provide for his family. It was known that he was never expected to return to work, and that he was providing for his large family on an income of only \$384.00 a month.³⁸ Thus the insurance company knew or should have known that this man could be unusually susceptible to emotional distress by threats of nonpayment. With that susceptibility in mind, the defendants wrongfully attempted to reduce plaintiff's already meager income, an act which could be seen as likely to cause severe mental suffering.

By its very nature, an insurer-insured relationship frequently contains the above-mentioned two factors, and thus is highly vulnerable to the "new tort" because of the ease with which conduct will be found outrageous. Even so it is felt that the *Fletcher* court was most influenced by yet a third factor.³⁹ The insurer in *Fletcher* held more than a position of power with respect to its policyholder—arising from its contractual relationship with the insured was a legal duty to protect the insured's interests.⁴⁰ The court, in recognizing that fact, stated:

An insurer owes to its insured an implied-in-law duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of the policy. . . . Included within this duty in the case of a liability insurance policy is the duty to act reasonably and in good faith to settle claims against the insured by a third person. . . . We think that, similarly, the implied-in-law duty of good faith and fair dealing imposes upon a disability insurer a duty not to threaten to withhold or actually withhold payments, maliciously and without probable cause, for the purpose of injuring its insured by depriving him of the benefits of the policy.⁴¹

The court explained that this special relationship and duties arising from it exist partly because of the great disparity in the economic situation and bargaining abilities of the insurer and insured and partly because of the fact that an insured is contracting not to obtain a commercial advantage but rather "to protect [himself] against the risks of accidental losses, including the mental distress which might follow from the losses."⁴²

It has been argued that this third factor, the implied duties of any insurer arising from the insurance relationship, played a dominant role in the court's

36 See note 26 *supra*.

37 See text accompanying note 31 *supra*.

38 10 Cal. App. 3d at 389, 89 Cal. Rptr. at 85.

39 Keenan, *The Insurer and the Tort of the Intentional Infliction of Mental Distress*, 1972 INS. COUN. J. 335.

40 "This third factor when present may in some cases be thought of as an extension of the position of power consideration, though both the earlier authorities and the *Fletcher* court fail to discuss it as such; or it may be considered a separate element." *Id.* at 339.

41 10 Cal. App. 3d at 401, 89 Cal. Rptr. at 93.

42 *Id.* at 405, 89 Cal. Rptr. at 95.

finding defendant's conduct to be outrageous.⁴³ This argument is based upon the fact that the real essence of defendant's wrong was the bad faith failure to perform its special duties of good faith and fair dealing. That is, the basis for their cancellation of benefits, and thus the basis for plaintiff's action, was defendant's bad faith interpretation of the plaintiff's medical reports. It was clear that the defendant intended to avoid its legal obligation. It hoped to create a dispute with full knowledge that the plaintiff would be hard pressed financially to contest or repay the benefits already received, and would probably be forced to settle on the insurance company's terms. In some areas of business, such practices as the defendant's are considered legally permissible though perhaps highly unethical. Yet, due to the special relationship and related duties which the court found to exist within an insurance agreement, it held the insurer's conduct to be impermissible.

While the court did not directly analyze the relationship between a disability insurer and the insured, its reliance on *Crisci*⁴⁴ indicates that it considered the relationship to be essentially the same as that present in the case of liability insurance and that similar duties arise from the relationship. Under the excessive liability doctrine which was followed in *Crisci*, a liability insurance contract, in addition to establishing an ordinary contractual relationship between the parties, creates a fiduciary relationship under which the insurer as fiduciary owes special duties to his insured. In acting in this fiduciary capacity a liability insurer is to act with the care of an expert in the defense of a personal injury suit.⁴⁵ The *Fletcher* court implied that the nature of the two insurance relationships is essentially the same, and that the disability insurer should be subjected to similar standards of care. The court noted that in all insurance situations the insured is basically contracting for financial and emotional security in the event of loss; this is especially true in disability insurance since the "very risks insured against presuppose that if and when a claim is made, the insured will be disabled and in strait financial circumstances. . . ."⁴⁶ It was with this consideration in mind that the court concluded that the disability insurer was acting as his insured's agent and was thus subject to the duties arising from that position. The acceptance of this responsibility places an insurer in a highly professional position, comparable to that of a physician or attorney. It not only requires expertise, but also makes the insurer highly responsible for its policyholder's well-being.⁴⁷ In light of this view of the insurer-insured relationship, it is understandable why the court found the defendant's actions to be outrageous.

Fletcher is unique in holding that an insurance company's threatened and actual bad faith refusals to make payments under its policy are essentially tortious in nature and are in themselves acts upon which there is sufficient basis (extreme and outrageous conduct) for an action against the insurer for inten-

⁴³ Keenan, *supra* note 39 at 339.

⁴⁴ *Crisci v. Security Pacific Ins. Co.*, 66 Cal. 2d 425, 426 P. 2d 173, 58 Cal. Rptr. 13 (1967).

⁴⁵ Appleman & Zimmerly, *Excess Liability of Insurer for Failure to Settle within Policy Limits*, 3 THE PLAINTIFF'S ADVOCATE & THE TRIAL LAWYERS QUARTERLY 204, 205 (1967).

⁴⁶ *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 405, 89 Cal. Rptr. 78, 95 (1970).

⁴⁷ Keenan, *supra* note 39 at 340.

tional infliction of emotional distress.⁴⁸ As we have already seen this decision rested upon a finding that the company employed refusals in conjunction with false and threatening communications directed to the disabled insured in an attempt to force him into surrendering his policy or disadvantageously settling a nonexistent dispute.⁴⁹ The court recognizing that a breach of contract was also present referred to the settled rule that punitive damages may not be recovered for breach of contract.⁵⁰ However, the court went on to say that if the conduct is tortious, damages for emotional distress including punitive damages are recoverable despite the fact that the conduct constituting the tort is also a breach of contract.⁵¹

The decision that an action in tort for the intentional infliction of emotional distress will lie for such behavior by an insurer is obviously a significant step outside the restrictions of prior law. It is also very reasonable to expect that, due to the inadequacies of prior law⁵² in redressing grievances in this area, the *Fletcher* holding will be accepted elsewhere, and expanded from the insurance contract field to other breach of contract situations with similar conditions.

C. *Eckenrode*: Implied Contract Duty

Recently, the U.S. Court of Appeals for the Seventh Circuit, in handing down the decision of *Eckenrode v. Life of America Insurance Co.*,⁵³ became the first court to follow California's lead in applying the "new tort" to an insurer's dealings with its policyholders.⁵⁴ In that case, the insured was the accidental victim of a homicide. Under the policy agreement, the insurer was to pay plaintiff (decedent's wife) \$5,000 immediately upon proof of death from "accidental causes." While plaintiff met all conditions of the policy and repeatedly demanded payment, defendant insurer refused to pay. The decedent left plaintiff with several children and no means of support. Denied payment by the insurer, she was forced to rely on charity for bare necessities.

Being fully aware of the accidental nature of decedent's death, the insurer breached the policy promise to pay immediately upon proof of death. In addition, the insurer, knowing plaintiff was in dire need of the policy proceeds, applied "economic coercion" in refusing to make payment on the policy and in "inviting" plaintiff to "compromise" her claim by implying that it (insurer) had a valid defense to the claim.⁵⁵ As a proximate result of defendant's conduct

48 In *Crisci*, mental suffering, although an incident of damages, was not an independent cause of action in itself.

49 *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78, 93 (1970).

50 *Id.* at 401, 89 Cal. Rptr. at 92.

51 *Id.* at 401, 89 Cal. Rptr. at 93.

52 See note 66 *infra*.

53 *Eckenrode v. Life of America Ins. Co.*, No. 71-1103 (7th Cir., Aug. 3, 1972).

54 In *Chaney v. Fields Chevrolet Co.*, 484 P. 2d 824 (Ore. 1971), plaintiff failed to raise the "new tort" at the trial court level. Additionally, defendant's conduct was not considered to be outrageous. *Gruenberg v. Aetna Ins. Co.*, 27 Cal. App. 3d 423, 103 Cal. Rptr. 887 (1972), involved an action for damages resulting from alleged bad faith and outrageous conduct in denying payment on three fire policies. The court held that defendant's conduct was not considered to be outrageous.

55 *Eckenrode v. Life of America Ins. Co.*, No. 71-1103 (7th Cir., Aug. 3, 1972). The court made reference to a letter sent by the insurance company suggesting that since the police

plaintiff suffered severe mental distress. The court held that plaintiff could, on these facts, recover damages for her mental suffering caused by the insurer's conduct. The court found defendant's conduct to be extreme and outrageous and held that she could recover damages for the tort of intentional infliction of mental distress.

The court made it clear that the insurer's behavior was characterized as "outrageous" after a consideration of its (1) position of power, and (2) its knowledge of plaintiff's peculiar susceptibility to pressure of this type. It is significant that this court did not even mention the factor which dominated the *Fletcher* court's finding of outrageousness, that is, the implied-in-law duty of good faith and fair dealing arising from the fiduciary nature of the insurer-insured relationship.

There is a valid question as to why the court in *Eckenrode* did not even mention the third factor which the *Fletcher* court found to be quite important. It is suggested that the answer to that question is found within one of the court's supporting considerations. The court in finding the insurer's behavior outrageous stated that it was also taking into consideration the fact that "insurance contracts are subject to the same implied conditions of good faith and fair dealing as are other contracts. . . ."⁵⁶ That is, in this court's view an insurance contract creates only a contractual relationship and not a fiduciary relationship.⁵⁷ By rejecting the idea of a fiduciary relationship, the court also rejects any implied-in-law duties arising from such a relationship.

The *Eckenrode* court, while rejecting those duties, brought others into play. Specifically, the court indicated that the duties of good faith and fair dealing which arise from the normal contractual relationship could serve as the basis for a cause of action in contract.⁵⁸ Foreseeability of emotional distress was not seen as problematic since the court felt that by the very nature of the risks insured against, an insurer is put on notice that a beneficiary would be susceptible to emotional distress from an insurer's use of high-pressure tactics.⁵⁹

Thus, in addition to finding a cause of action in tort, the *Eckenrode* court has made a rather clear statement that an action also will lie in contract for a breach of the implied duties of good faith and fair dealing and that in an insurance contract context mental distress is a foreseeable result of a breach of those implied duties. This, of course, is a significant finding. Although a plaintiff may avoid the foreseeability problem by suing in tort, he now may have the option of suing in contract for emotional distress, which the *Eckenrode* court feels is a foreseeable damage. However, this is only dicta and there has not yet been a decision on that basis.

investigation would probably not be completed until the "very distant future," she might consider offering to "settle" rather than waiting for the police report to be completed.

⁵⁶ *Id.* at 7.

⁵⁷ *Id.*

⁵⁸ That these duties are seen as the basis for an action in contract for mental distress is made clear in a footnote to the opinion: "We think it is clear that an action of the type involved here sounds both in contract and in tort." *Id.* n.4.

⁵⁹ *Id.* at 7.

III. Conclusion

While an insurer's bad faith refusal to pay benefits is a breach of contract, the damages traditionally permitted under contract law have proven inadequate where, as a result of the insurer's refusal, its policyholder suffers severe emotional distress. This inadequacy in relief is due to the decision that such mental suffering is not reasonably foreseeable by an insurer at the time he made the contract.⁶⁰

The requirement that contract damages be foreseeable resulted from a realization that allowing full compensation could impose a crushing burden on a breaching party.⁶¹ It has further been observed that the common law has placed significant limitations on the extent to which a promisee can recover damages for disappointed expectations.⁶² These same considerations explain the limitation which generally denies recovery for mental suffering in contract actions, the risk of which must normally be borne by the promisee.⁶³

While contract law has been stubborn in continuing to strictly limit recoverable damages so as to promote a favorable business climate, tort law has come to recognize that the insured's interests need protection also. The tort of intentional infliction of mental distress has been a key weapon in protecting the individual against the more tortious acts of bill collectors and others.⁶⁴ With *Fletcher*, and more recently *Eckenrode*, it is clear that such protection will be available to an aggrieved person in the insurance field. The "new tort" remedies many of the failings of an action in contract. The greater flexibility of a tort measure of damages serves both to better compensate the insured and to deter insurers from denying future claims. Contract damages have been inadequate in both these respects. A plaintiff with limited financial and legal resources would often be precluded from bringing suit where the hope is for only a limited recovery. In allowing recovery for all proximately caused injury, an action in tort provides a plaintiff with a suit which is worth bringing, and one which will allow redress of all his injuries.

The tort action also tends to deter future bad faith nonpayment by insurers through the awarding of larger compensatory and punitive damages. Without these larger assessments an insurer has little to lose by denying the claims of persons who he feels can be overcome by pressure.⁶⁵ This fact is attested to by the claims manager in *Fletcher* who admitted that he would not hesitate to use the same tactics again in a similar situation.⁶⁶ The larger award in tort would discourage such practices.

While a tort measure of damages makes for a fuller recovery and deters insurers from such practices, we must still be concerned with the threat of run-away punitive damages. Contract law has expressed a legitimate concern over

60 See note 9 *supra*.

61 Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970).

62 *Id.* at 1207-08.

63 *Id.* at 1208.

64 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 57 (4th ed. 1971).

65 If the insured were to later bring an action for breach of contract, he would normally only be able to recover the policy benefits which he was already entitled to receive. See note 9 *supra*.

66 *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 408-09, 89 Cal. Rptr. 78, 99 (1970).

the possible effect of large recoveries from businesses. The threat of this happening through large punitive assessments must be recognized. As pointed out, however, punitive damages are quite helpful in preventing such behavior by insurers in the first instance.

Obviously, a balancing of the conflicting interests of the insurer and insured is required. This balancing has been effectively achieved by some states through statutes which allow for, but limit the amount of punitive damages recoverable for late or unjustified nonpayment of a policy's benefits.⁶⁷ A properly drawn statute can protect both the insurance companies and the insured public. While insurers have in the past opposed such penalty statutes their opposition has probably been, in large part, due to the favored position they have held under the common law. In light of the recent developments in the tort of intentional infliction of emotional distress their attitude towards limiting statutes may be changing.

While mental suffering resulting from an insurer's refusal to pay has traditionally been treated as unforeseeable contract damages the error and injustice of a finding of unforeseeability are only now being recognized. The possibility of a contract cause of action for mental distress in the insurance field is significant. Although its importance is diminished with the applicability of the "new tort" to this area, it nevertheless will serve as a good alternative to a suit in tort where outrageousness or another requirement of a tort action is not met.

These developments have added a whole new dimension to the field of insurance contracts. From a position of virtual immunity to one of intense scrutiny, the insurer now has added reasons to deal fairly with its policyholders. While an insurer should not be subjected to crushing penalties for its misbehavior, it is time that it be held responsible for the duties it has accepted. It is also time that the often helpless policyholder is given a meaningful remedy against such unscrupulous activities.

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⁶⁷ *E.g.*, TEX. CIV. STAT. INS. CODE § 3.62 (Vernon's 1963) which provides that the insurer shall pay twelve per cent damages in addition to the loss, and attorney's fees, for a failure to pay within thirty days after demand is made under the policy.