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Insurance Law: Ohio Recognizes Tort Duty of Good Faith and Fair Dealing between an Insurer and Its Insured

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CASENOTES

INSURANCE LAW: OHIO RECOGNIZES TORT DUTY OF GOOD FAITH AND FAIR DEALING BETWEEN AN INSURER AND ITS INSURED—*Hoskins v. Aetna Life Insurance Co.*, 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).

I. INTRODUCTION

The economic and social roles of insurance companies are vitally important to every individual and every business in the United States.[1] Society views insurance as the mechanism which transfers the risks of economic catastrophe and financial hardship to those more capable of bearing the financial burden—the insurers.[2] Insurance also provides the indemnification which provides the security required to stimulate investment and ultimately the economic growth of all American industries.[3] Because the insurance industry plays such an integral role in the American economy, insurance companies must remain economically sound. Therefore, an insurance company has a right, as well as a public duty, to question the validity of all claims.[4] No one would benefit if the insurance industry repeatedly honored fraudulent claims.[5]

Unfortunately, because of the vast wealth and resources available to the insurance industry, insureds have often found themselves at the mercy of their own insurance companies.[6] As state and federal courts became aware of this problem, they focused upon protecting the rights of the insured[7] and began providing various legal remedies.[8] In *Hoskins v. Aetna Life Insurance Co.*,[9] the Ohio Supreme Court delineated its legal remedy for an insured who has suffered harm from a wrongful

1. Note, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend*, 45 FORDHAM L. REV. 164 (1976).
2. Birnbaum & Wrubel, *Extracontractual Damages against Insurers: An Overview*, in EXTRACONTRACTUAL DAMAGES 2 (J. Groves ed. 1983).
3. Hirsch, Carpenter & Carpenter, *Strict Liability: A Response to the* Gruenberg-Silberg *Conflict Regarding Insurance Litigation Awards*, 7 SW. U.L. REV. 310 (1975) [hereinafter cited as *Strict Liability*].
4. Note, *supra* note 1, at 164.
5. *Id.*
6. *Id.* at 165–67.
7. *Strict Liability*, *supra* note 3, at 310.
8. *See infra* notes 35–44 and accompanying text.
9. 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).

denial of a claim upon his or her own insurer. In *Hoskins*, the Ohio Supreme Court followed California's lead,[10] and imposed a duty of good faith and fair dealing upon insurance companies when they handle the claims of insureds.[11] Consequently, since a breach of this legal duty constitutes a tort,[12] an insured is no longer limited to the contract amount[13] but may now recover extracontractual damages.[14]

This note will outline the general concepts and developments in this area of the law, and will analyze the Ohio Supreme Court's legal remedy set forth in *Hoskins*. In addition, the practical effects of *Hoskins* upon the insurance industry and insurance litigation will be considered.

II. Facts and Holding

In *Hoskins v. Aetna Life Insurance Co.*,[15] Carl Hoskins' insurance company, Aetna Life, refused to pay health benefits to Mrs. Hoskins pursuant to a group hospitalization and medical policy.[16] In October of 1977, Mrs. Hoskins was admitted to the medical-surgical unit of the Hocking Valley Community Hospital after suffering from a stroke.[17] After more than one year of medical care and physical therapy, she was transferred from the medical-surgical unit to the hospital's skilled-nursing unit.[18] This transfer was made for the hospital's convenience and to facilitate Mrs. Hoskins' physical therapy.[19]

On March 2, 1979, a year after Mrs. Hoskins was transferred to the skilled-nursing unit, Mr. Hoskins received notice that his wife's medical coverage had expired. Aetna informed him that the transfer to the skilled-nursing unit was considered a transfer to a "convalescent facility" and coverage in such a facility expired after 365 days.[20]

After numerous attempts to explain that Mrs. Hoskins was still receiving "hospital" treatment, the plaintiffs filed a complaint in the Hocking County Common Pleas Court. Alleging that Aetna's refusal to

10. *See infra* notes 46–54 and accompanying text.
11. *Hoskins*, 6 Ohio St. 3d at 276, 452 N.E.2d at 1319 (1983).
12. *Id.* at 276, 452 N.E.2d at 1320.
13. *See infra* text accompanying notes 7 & 28.
14. *See infra* text accompanying notes 29–31.
15. 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).
16. *Id.* at 273, 452 N.E.2d at 1317.
17. *Id.* at 272, 452 N.E.2d at 1317.
18. *Id.*
19. Mrs. Hoskins' physical therapy required the use of a tilt table which was located at the opposite end of the hospital from the medical-surgical unit. Her physician ordered the transfer exclusively to facilitate convenient access to the tilt table since "[i]t was quite an ordeal to move all this equipment from the [physical therapy] department to [Mrs. Hoskins'] room every day." *Id.*
20. *Id.* at 273, 452 N.E.2d at 1317-18.

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pay the hospital bill was a breach of the insurance policy, the Hoskinses prayed for compensatory and punitive damages.[21] The trial court ruled that the complaint did not properly set forth a cause of action in tort that justified an award of punitive damages.[22] The jury returned a verdict in favor of the Hoskinses in the sum of $184,000 which was reduced by the trial judge to $20,792.91.[23]

The Hoskinses appealed to the Court of Appeals for Hocking County, which reversed the trial court decision in part and remanded the case, holding that the issue of punitive damages should have gone to the jury. The appellate court held that although punitive damages are generally unavailable for breach of contract,[24] when the breach constitutes a willful, wanton, and malicious tort, punitive damages may be assessed.[25] On appeal, the Ohio Supreme Court chose not to follow the exception noted by the court of appeals, and for the first time held that insureds may sue their own insurance companies in tort, premised on a duty of good faith and fair dealing.[26]

III. Background—Recovering Damages

A. *Traditional View*

An insurance policy is actually a reverse unilateral contract defining the rights and obligations which exist between the insurance company and its insured.[27] Accordingly, in the event that an insurance policy is breached, the courts are bound by contract law in determining the appropriate legal remedies. Such legal remedies are generally limited to the face amount of the insurance policy—based on the contract principle that the legal remedy should merely place the nonbreaching party in the position he or she would have been in had the contract been fully performed.[28] In the famous English case of *Hadley v. Bax-*

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21. *Id.* at 274, 452 N.E.2d at 1318.

22. *Id.*

23. *Id.* The judgment was reduced after a judgment notwithstanding the verdict motion.

24. *See* Ketcham v. Miller, 104 Ohio St. 372, 136 N.E. 145 (1922); Tibbs v. National Home Constr. Corp., 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1977).

25. Hoskins v. Aetna Life Ins. Co., No. 353 (Ct. App. Hocking County, Ohio, released Jan. 21, 1982). *See also* Sweet v. Grange Mut. Casualty Co., 50 Ohio App. 2d 401, 364 N.E.2d 38 (1975); Kirk v. Safeco Ins. Co., 28 Ohio Misc. 44, 273 N.E.2d 919 (C.P. Franklin County 1970).

26. *Hoskins*, 6 Ohio St. 3d at 276, 452 N.E.2d at 1319.

27. Birnbaum & Wrubel, *supra* note 2, at 2 (citing Restatement (Second) of Contracts 55, comment a, illustration 1 (1981)). In exchange for the insured's prepaid consideration, the insurance company promises to pay for losses that may be incurred by the insured. *Id.* Narrowly viewed, however, an insurance policy simply defines the contractual obligations between the insurance company and its insured. *Id.*

28. *See generally* 5 A. Corbin, Corbin on Contracts § 992 (1964); C. McCormick, Damages § 137 (1935); 11 S. Williston, A Treatise on the Law of Contracts § 1338 (3d ed. 1968 & Supp. 1983).

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endale,[29] the court expanded on this general rule and delineated the parameters for the recovery of consequential damages[30] in contract cases. The court allowed for the recovery of consequential damages "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[31] Most courts have subsequently adopted a narrow interpretation of the foreseeability portion of this test.[32] Since courts adopt a narrow view of foreseeability, this portion of the *Hadley v. Baxendale* test[33] is very difficult to prove in most contract cases. Accordingly, although an exception for the recovery of consequential damages exists, such damages are generally unavailable in breach of insurance policy cases because of the contract law limitations on their recovery.[34]

B. Modern Trends

Historically, an insurance company had little to lose by wrongfully denying a claim. Under traditional contract law, an insurance company would only be responsible for the face amount of the contract plus interest if a court found that the company had breached a contract by wrongfully denying a claim.[35] Obviously, it was worth the gamble, in many cases, to simply deny the claim, and hope that a court would find the claim invalid.[36] In response to the inadequacies of the limited recovery available under contract law, courts and legislatures have attempted to deter abuses.[37]

Courts have expounded five possible legal theories in an attempt to

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29. 156 Eng. Rep. 145 (1854).

30. Consequential damages are those damages which do not flow directly or "naturally" from the parties' breach, but are due to some special circumstances. *See* J. Calamari & J. Perillo, The Law of Contracts § 14-5 at 524–25; E. Farnsworth, Contracts § 12.14 at 874–75 (1982). *Cf.* U.C.C. § 2-715(2) (1977). Examples of consequential damages are: lost profits, loss of employment, and emotional distress. *See generally* Birnbaum & Wrubel, *supra* note 2, at 3.

31. *Hadley*, 156 Eng. Rep. at 151.

32. E. Farnsworth, *supra* note 30, § 12.14 at 876. *See, e.g.*, Jefferson County Burial Soc'y, Inc. v. Curry, 237 Ala. 548, 187 So. 723 (1939); Clark v. Life & Casualty Ins. Co., 245 Ky. 579, 53 S.W.2d 968 (1932); Bye v. American Income Life Ins. Co., 316 So. 2d 164 (La. Ct. App.), *writ denied*, 320 So. 2d 208 (La. 1975); Haas v. Pacific Mut. Life Ins. Co., 70 Ohio App. 332, 41 N.E.2d 263 (1941).

33. 156 Eng. Rep. at 151.

34. Birnbaum & Wrubel, *supra* note 2, at 3–4.

35. *Id.* at 5.

36. *Id.*

37. Enacted statutes usually permit recovery of punitive damages and attorney fees for the insurance company's wrongful denial of a valid claim. *See, e.g.*, Ark. Stat. Ann. § 66-3238 (1980); Idaho Code § 41-1839 (Supp. 1984); Ill. Ann. Stat. ch. 73, § 767 (Smith-Hurd Supp. 1976); La. Rev. Stat. Ann. § 22:658 (West 1978); Mo. Ann. Stat. § 375.420 (Vernon Supp. 1984); Neb. Rev. Stat. § 44-359 (1978); Tex. Rev. Civ. Stat. art. 3.62 (Vernon 1981).

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provide adequate relief to an insured.[38] First, some courts have expanded upon contract law to permit recovery of damages (including consequential damages) proximately caused by the breach of a policy.[39] A second approach has been to permit recovery beyond policy limits by finding a cause of action in fraud.[40] Since this is a cause of action pursuant to tort law, the contract law limitations on recovery are not applicable. A third theory is that an insured may recover damages for intentional infliction of emotional distress caused by the wrongful denial.[41] Fourth, a recovery beyond policy limits may be possible by claiming the insurance company improperly interfered with the insured's property rights.[42] The final theory adopted in many states is the tort theory that the insurance company has acted in bad faith.[43] The Ohio Supreme Court adopted this tort theory for first party claims[44] in *Hoskins v. Aetna Life Insurance Co.*[45]

C. *Implied-by-Law Duty of Good Faith*

Recovery under the tort theory of bad faith was first allowed in the seminal case of *Comunale v. Traders & General Insurance Co.*[46] In

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38. Birnbaum & Wrubel, *supra* note 2, at 5.

39. There are three principles which underlie contract law. First, both parties stand at arm's length and have equal bargaining power, and therefore can provide for any foreseeable problems. Second, money is always available at a reasonable interest rate. Third, it is advantageous to have a standard measure of damages. Some courts, which hold a liberalized view of contract law, simply hold that these principles are not applicable in insurance contracts and therefore permit recovery of consequential damages. *See* Note, *supra* note 1, at 168–71.

40. *Id.* at 171–74. "A cause of action for fraud has been approached from two distinct standpoints—fraud in the inducement and fraudulent breach of contract." *Id.* at 171.

41. *Id.* at 174–77. *See, e.g.*, Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970). This is also a tort theory and, therefore, recovery is not limited to the policy amount.

42. *See* T. RILEY, *Proving Punitive Damages: The Complete Handbook* 69 (1981). Riley implies that although no court has adopted this approach, it is a possible cause of action. The rationale is that because an insurance company has denied an insured's claim, and therefore caused conversion of the insured's assets in order to meet financial obligations, the company has improperly interfered with the insured's property rights. *Id.*

43. *See* Note, *supra* note 1, at 177–81 and *infra* text accompanying notes 45–61.

44. A first party claim is a claim which the insured makes upon his or her own insurance company because of a personal loss. A third party claim is a claim based on the company's contractual obligation to protect its insured from liability to a third person for injury to a person or property. Third party claims include the duty to settle reasonable claims. *See generally* DuBois & Bronson, *The Spectre of Punitive Damages in First Party Actions*, 40 INS. COUNS. J. 290, 291–93 (1973).

45. 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).

46. 50 Cal. 2d 654, 328 P.2d 198 (1958). *Comunale* involved a third party claim. Because of the inherent differences between first party and third party cases, it is not surprising that recovery for bad faith first emerged in the third party cases. Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention*, 13 PAC. L.J. 833, 834 (1982). In the third party cases, the insured has no control over the litigation and settlement process. Therefore, since the insurer has control, it also has a corresponding duty to protect the rights of the insured—a duty not found in

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that case, the insurance company wrongfully refused to defend its insured in a personal injury suit, and wrongfully refused to settle the claim against the insured for an amount below the policy limits.[47] The jury returned a judgment in excess of the policy limits against the insured. The insured then assigned his rights against the insurance company to the original plaintiff who sued the insurance company on the bad faith theory.[48] In permitting the plaintiff-assignee to recover damages equal to the jury verdict, the California Supreme Court held that there was an implied covenant of good faith and fair dealing that prohibits either party to an insurance contract from interfering with the right of the other party to receive the benefits of the agreement.[49] Although the court held that damages in excess of policy limits are permitted when an insurance company breaches this "good faith" duty, the California Supreme Court adhered to contract principles and denied any recovery of consequential damages beyond the excess judgment amount.[50]

This new concept of good faith and fair dealing was subsequently expanded in *Crisci v. Security Insurance Co.*[51] As the result of a judgment in excess of the plaintiff's policy limits, the plaintiff suffered financial loss, a decline in physical and mental health, and subsequently attempted to commit suicide.[52] The California Supreme Court, apparently outraged at the insurance company's conduct, held that the plaintiff could recover consequential damages for mental distress caused by the insurance company's breach of the "good faith" duty outlined in *Comunale.*[53] The court emphasized the general tort rule "that the injured party may recover for all detriment caused whether it could have been anticipated or not."[54]

One year after the *Comunale* decision, the Ohio Supreme Court also recognized that an insurance company owes a duty of good faith to its insured in *third* party claims. In *Hart v. Republic Mutual Insur-*

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first party cases. *Id.* The Ohio Supreme Court also recognized this third party duty in *Hoskins*, 6 Ohio St. 3d at 275, 452 N.E.2d at 1319 (citing Battista v. Lebanon Trotting Ass'n, 538 F.2d 111, 118 (6th Cir. 1976)).

47. *Comunale*, 50 Cal. 2d at 657, 328 P.2d at 200.

48. Therefore, the plaintiff-assignee stood in the shoes of the insured. *Id.* at 657–58, 328 P.2d at 200.

49. *Id.* at 658, 328 P.2d at 200.

50. *Id.* at 661, 328 P.2d at 202.

51. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). In *Crisci*, the insurance company rejected a $9,000 settlement offer. Although Mrs. Crisci's insurance policy had a $10,000 limit, the judgment against her was for $101,000. *Id.* at 428, 426 P.2d at 176, 58 Cal. Rptr. at 16.

52. *Id.* at 429, 426 P.2d at 176, 58 Cal. Rptr. at 16.

53. *Id.* at 433–34, 426 P.2d at 178–79, 58 Cal. Rptr. at 18–19.

54. *Id.*

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ance Co.,[55] the Ohio Supreme Court stated in the syllabus that "[an insurance] company is liable to respond in damages to its insured if it fails to act in good faith with respect to the settlement of such a claim."[56] Subsequent Ohio decisions further explained this implied-by-law duty of good faith.[57]

Although the *Comunale* line of cases provided adequate relief in *third* party cases, *first* party claims were still limited by general contract principles. If an insurance company wrongfully denied coverage of a *first* party claim, and the insured subsequently suffered financial, physical, or mental hardships due to the denial of insurance proceeds, the insured could not successfully bring a cause of action under the duty of good faith theory.[58] The California Supreme Court decision in *Gruenberg v. Aetna Insurance Co.*,[59] however, finally extended recovery based on the implied-by-law duty of good faith and fair dealing to the breaches of insurance policies in *first* party claims.

In *Gruenberg*, the insurance company refused to pay a claim under an insurance policy covering fire loss.[60] The California Supreme Court held that despite the inherent differences between first and third party claims, a breach of either is "merely two different aspects of the same duty."[61] The decision in *Gruenberg*, therefore, finally provided authority to permit recovery in first party claims under the bad faith

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55. 152 Ohio St. 185, 87 N.E.2d 347 (1949). *Hart* involved an insurer's wrongful refusal to settle a claim within the insured's policy limits. The jury subsequently rendered a judgment in excess of the policy limit and the insured was financially responsible for the entire judgment. *Id.* at 186–87, 87 N.E.2d at 348–49.

56. *Id.* at 185, 87 N.E.2d at 348.

57. Until *Hoskins*, all of the Ohio cases which recognized an implied duty of good faith were cases involving third party claims. *See, e.g.*, Battista v. Lebanon Trotting Ass'n, 538 F.2d 111 (6th Cir. 1976); Centennial Ins. Co. v. Liberty Mut. Ins. Co., 62 Ohio St. 2d 221, 404 N.E.2d 759 (1980); Motorists Mut. Ins. Co. v. Trainor, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973); Slater v. Motorist Mut. Ins. Co., 174 Ohio St. 148, 187 N.E.2d 45 (1962); Saberton v. Greenwald, 146 Ohio St. 414, 66 N.E.2d 224 (1946).

In a recent decision, the Ohio Supreme Court extended this duty to issuers of financial responsibility bonds when they handle and pay the claims of injured third parties. Suver v. Personal Serv. Ins. Co., 11 Ohio St. 3d 6, 462 N.E.2d 415 (1984). The case is interesting because the court created a duty between the *third* party and the surety despite the lack of privity which the dissent in *Suver* thought was critical to the result in *Hoskins*. *Id.* at 9–10, 462 N.E.2d at 418 (Holmes, J., dissenting).

58. *See supra* notes 27–34 and accompanying text. The insureds in first party claims were still limited to the face amount of the policy plus interest.

59. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

60. *Id.*

61. *Id.* at 573, 510 P.2d at 1037, 108 Cal. Rptr. at 485. "[T]hat responsibility is not the requirement mandated by the terms of the policy itself—to defend, settle, or pay. It is the obligation, deemed to be imposed by law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities." *Id.* at 573–74, 510 P.2d at 1037, 108 Cal. Rptr. at 485.

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theory. First party claimants were now able to recover damages traditionally available under tort law: nominal, compensatory, consequential, and ultimately, punitive damages.

IV. ANALYSIS

A. Introduction

The law in Ohio was well established—courts shall impose a duty of good faith and fair dealing on insurance companies in third party cases.[62] As with most other states, however, there were no established legal remedies in first party cases beyond the traditional recovery permitted under contract law.[63]

Despite the lack of supreme court authority, several Ohio lower court decisions hinted at a tort theory for recovering damages caused by a breach of the insurance contract in first party claims. In *Kirk v. Safeco Insurance Co.*,[64] the Franklin County Common Pleas Court found that the actions of an insurer in refusing to pay a claim "were such as to be a breach of contract amounting to a wilful, wanton and malicious tort" and awarded punitive damages.[65] This case was followed and cited by the Ashland County Court of Appeals in *Sweet v. Grange Mutual Casualty Co.*[66] Ultimately, however, both cases emphasized that this contract "tort" required an adequate showing that the breach was malicious.[67] It is unclear whether the courts were requiring this standard to establish the elements of a "tort" or to fulfill the requirements for "punitive damages." This confusion, however, became moot with the Ohio Supreme Court's decision in *Hoskins*.

In *Hoskins v. Aetna Life Insurance Co.*, the Ohio Supreme Court expanded the limited exception provided in *Kirk*[68] and *Sweet*,[69] and applied the implied-by-law duty of good faith and fair dealing, previously recognized only in third party claims.[70] Because this implied-by-law duty of good faith and fair dealing sounds in tort, the *Hoskins* court held that punitive damages are recoverable if the necessary elements of punitive damages[71] are established.[72] Although the court

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62. *See supra* notes 55–57 and accompanying text.
63. *See supra* notes 27–34 and accompanying text.
64. 28 Ohio Misc. 44, 273 N.E.2d 919 (C.P. Franklin County 1970).
65. *Id.* at 46, 273 N.E.2d at 921.
66. 50 Ohio App. 2d 401, 364 N.E.2d 38 (1975).
67. *Sweet*, 50 Ohio App. 2d at 406, 364 N.E.2d at 41; *Kirk*, 28 Ohio Misc. at 46, 273 N.E.2d at 921.
68. *Kirk*, 28 Ohio Misc. 44, 273 N.E.2d 919.
69. *Sweet*, 50 Ohio App. 2d 401, 364 N.E.2d 38.
70. 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).
71. *See infra* notes 85–89 and accompanying text.
72. *Hoskins*, 6 Ohio St. 3d at 277, 452 N.E.2d at 1320.

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adopted the implied-by-law duty for first party cases, and clearly stated that extracontractual damages may be recovered, the *Hoskins* court held that the requirements for punitive damages were not sufficiently asserted,[73] and the trial court was therefore correct in denying punitive damages to the Hoskinses.[74]

B. Bad Faith

The *Hoskins* court, expanding the decision in *Hart v. Republic Mutual Insurance Co.*,[75] and following the California Supreme Court's decision in *Gruenberg v. Aetna Insurance Co.*,[76] created an implied-by-law duty of good faith in first party claims.[77] Accordingly, an insurance company which breaches this duty is not only breaching the insurance contract, but is also breaching a legal duty sounding in tort, thereby allowing a broader range of recoverable damages. Since *Hoskins* expanded *Hart* and followed *Gruenberg*, it is both appropriate and helpful to refer to third party case law and California decisions in resolving questions of law spurred by the *Hoskins* decision.

Because Ohio law now imposes a legal duty on all insurance companies to act in good faith, the question inevitably arises as to what constitutes good faith. In *Hoskins*, the court looked to *Slater v. Motorists Mutual Insurance Co.*,[78] for assistance in determining what constitutes a breach of this duty.[79] The *Slater* court stated that the lack of good faith is the equivalent of bad faith, and that bad faith is difficult to define.[80] The court, however, attempted to explain the concept of bad faith, noting that:

> [B]ad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.[81]

The *Hoskins* court added to the *Slater* definition of bad faith by requiring that an insurance company's decision be based on the totality of the circumstances, and that the decision must not be arbitrary or

73. *Id.* at 278, 452 N.E.2d at 1322.
74. *Id.* at 279–80, 452 N.E.2d at 1322.
75. 152 Ohio St. 185, 87 N.E.2d 347 (1949).
76. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).
77. *Hoskins*, 6 Ohio St. 3d at 276, 452 N.E.2d at 1320.
78. 174 Ohio St. 148, 187 N.E.2d 45 (1962).
79. *Hoskins*, 6 Ohio St. 3d at 276, 452 N.E.2d at 1320.
80. *Slater*, 174 Ohio St. at 148, 187 N.E.2d at 46.
81. *Id.*

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capricious.[82] Although the court never related the specific facts in *Hoskins* to the *Slater* requirements,[83] the court nonetheless determined that Aetna's denial of Mr. and Mrs. Hoskins' health benefits constituted bad faith.[84]

C. *Punitive Damages*

Because recovery for wrongful denials of first party claims is grounded in tort, an insured may now sue an insurance company for punitive damages. Since bad faith cases, whether first or third party claims, focus increasingly on the conduct of the insurer rather than the injury to the insured,[85] punitive damages are an appropriate remedy. Unlike compensatory damages which merely compensate the insured, punitive damages, in "bad faith" cases, will serve the additional purposes of retribution, punishment, and deterrence.[86]

It is imperative to note that there is a distinction, however, between the type of conduct which constitutes a breach of the legal duty of good faith,[87] and the type of conduct which gives rise to punitive damages.[88] Although Aetna breached its legal duty of good faith, the *Hoskins* court denied the plaintiffs' recovery of punitive damages because they failed to prove that the insurance company's conduct was actually malicious.[89]

Although, in denying punitive damages, the majority in *Hoskins* did not consider Aetna's conduct malicious,[90] Justice Clifford Brown's

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82. *Hoskins*, 6 Ohio St. 3d at 277, 452 N.E.2d at 1320.

83. *Id.* at 278–79, 452 N.E.2d at 1321–22.

84. *Id.* at 278, 452 N.E.2d at 1321. As noted, the *Hoskins* court never specifically stated that the insurance company breached its duty of good faith and fair dealing. Such a conclusion, however, is gleaned from a reading of the entire case. *See, e.g., id.* at 272, 452 N.E.2d at 1316 ("A breach of this duty will give rise to a cause of action in tort against the insurer."); *id.* at 278, 452 N.E.2d at 1321 ("In view of the law as stated above, this court is now able to address the precise issue raised by this appeal . . . .").

85. Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. REV. 613, 630 (1979).

86. *Id.* at 629.

87. *See supra* notes 78–84 and accompanying text.

88. *Hoskins*, 6 Ohio St. 3d at 277–78, 452 N.E.2d at 1321. *See also* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462–63, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974).

89. *Hoskins*, 6 Ohio St. 3d at 278–79, 452 N.E.2d at 1322. The basic elements required for a recovery of punitive damages in Ohio are actual malice, fraud, or oppression. Columbus Fin., Inc. v. Howard, 42 Ohio St. 2d 178, 183–84, 327 N.E.2d 654, 658 (1975). Actual malice, as defined by Ohio law, is "that state of mind under which a person's conduct is characterized by hatred or ill will, a spirit of revenge, retaliation, or a determination to vent his feelings upon other persons." Pickle v. Swinehart, 170 Ohio St. 441, 443, 166 N.E.2d 227, 229 (1960).

90. "[I]t cannot be found that [the insurance company] acted with actual malice in determining that the skilled nursing unit was a 'distinct part' of the institution." *Hoskins*, 6 Ohio St. 3d at 278, 452 N.E.2d at 1321.

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separate opinion[91] emphasized that the court should consider the public policies supporting recovery of punitive damages.[92] Justice Brown stated that the public policies underlying an award of punitive damages include the promotion of public safety, specific deterrence, and general deterrence. In the last sentence of his opinion, he seems to imply that punitive damages are especially applicable in bad faith insurance cases, and that if a jury finds such an award appropriate, the appellate courts should not overturn the decision.[93]

V. CONCLUSION

The consequences of *Hoskins* remain to be seen. Because the Ohio Supreme Court has essentially created a new cause of action which now permits recovery in first party cases, it is foreseeable that complaints will now seek tort damages under the duty of good faith theory. Although the supreme court has expanded the legal remedies available in insurance cases, it is possible that the court may simultaneously restrict the recovery of punitive damages. Since the *Hoskins* court refused to award punitive damages while, at the same time, establishing the implied-by-law duty for first party claims, it is possible that the court has actually purported to continue awarding insureds for compensatory damages while requiring that a higher standard for recovery of punitive damages be satisfied.

The impact of this decision will probably affect not only the insurance companies, but the policy owners as well. The public's response, therefore, may parallel the arguments made for and against the recovery of damages under this new theory. The public surely wants to contravene malicious denials of claims, but it does not desire the corresponding rise in consumer costs which may inevitably result from the award of punitive damages.

Colleen M. Hunt

91. Justice Brown concurred with the majority in its holding that Aetna breached its implied-by-law duty of good faith, but dissented regarding the punitive damages issue. *Hoskins*, 6 Ohio St. 3d at 280–81, 452 N.E.2d at 1323.

92. *Id.*

93. *Id.* at 281, 452 N.E.2d at 1323.

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