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The Widening Scope of Insurer's Liability

Sandra M. Varellas

University of Kentucky

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What methods of redress are available to a plaintiff whose insurer has used underhanded techniques to withhold payments due the insured? Can the insured recover the financial loss he suffered as a result of the actions of the insurance company? Can the insurance company be required to pay him punitive damages as a means of "punishing" the company for its inexcusable actions? If so, what kind of conduct on the part of the insurance company might give rise to such a cause of action? These questions, which in recent years have confronted courts in a number of states, particularly California, have produced several adverse decisions for the insurance industry.

For example, consider the facts in a recent California case: Jerome Gruenberg, the owner of a restaurant and cocktail lounge, was insured for a total of $35,000 against fire loss under policies carried by three insurance companies. In the early morning hours of November 9, 1969, the restaurant and lounge were virtually destroyed by fire. A few days after the fire an adjuster representing the insurance companies told an arson investigator of the fire department that Gruenberg had excessive fire insurance coverage. Shortly thereafter Gruenberg was arrested and charged, in a felony complaint, with arson and defrauding an insurer. Despite the fact that the insurance adjuster appeared as a witness for the prosecution and again stated that Gruenberg's coverage was excessive, the magistrate found no probable cause for the charges and they were dismissed.

While the charges were still pending, however, the insurance company, on the authority of the "cooperation and notice" clause of California's Insurance Code, demanded that

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1 See cases discussed in Section III infra.
4 CAL. INS. CODE § 2071 (West 1972). Under a paragraph entitled "Requirements
Gruenberg submit to an examination under oath and produce certain documents. In response, Gruenberg explained that he could not appear during the pendency of the felony prosecution and asked that the examination be postponed until after the conclusion of those proceedings. The companies refused this request and notified him that due to his failure to appear they were denying liability under the policies.\footnote{5}{Under a paragraph entitled “Suit”, \textit{CAL. INS. CODE} § 2071 (West 1972) states: “No suit or action on this policy for the recovery of any claim shall be sustainable... unless all the requirements of this policy shall have been complied with...”}

Therefore, by alleging that Gruenberg had excessive insurance, which in turn led to a charge of arson, the insurance companies made it impossible for him to appear for an examination and thereby avoided liability under the fire insurance policies. As a result, Gruenberg suffered substantial economic losses—he lost earnings, was unable to pay his creditors and ultimately was forced out of business—and considerable emotional distress.

In overturning the trial court’s dismissal of Gruenberg’s action against the insurance companies, the California Supreme Court in \textit{Gruenberg v. Aetna Insurance Co.}\footnote{6}{510 P.2d 1032, 108 Cal. Rptr. 480 (Cal. 1973).} determined that the actions of the insurers gave rise “to a cause of action in tort for breach of an implied covenant of good faith and fair dealing.”\footnote{7}{\textit{Id.} at 1037, 108 Cal. Rptr. at 485.} Hence, the court found that Gruenberg could recover both compensatory and punitive damages from the insurance companies even \textit{without} a finding that the insurers engaged in outrageous conduct.

A review of the development of the law in California before \textit{Gruenberg} will allow a fuller understanding of the import of this case and will prepare the reader for a more detailed analysis of the decision. In addition, a discussion of the evolution and present status of this area of the law in other states, including Kentucky, will be presented. But first, in order to more
fully appreciate the recent changes in the nature and scope of insurer's liability, a brief incursion into the historical background of this area of the law will be helpful.

I. HISTORICAL BACKGROUND OF INSURER’S LIABILITY

A. Contract Liability

There are several theories upon which an insured party can base an action against a recalcitrant insurance company. One such theory is breach of contract. Historically, however, damages recoverable for breach of contract have been severely limited, normally being restricted to those that were foreseeable by the parties at the time they made the contract. Thus, in actions for breach of "commercial", as opposed to "personal", contracts, damages for mental suffering generally are not recoverable. Whenever the contract is considered "personal", however, courts ordinarily allow recovery for mental suffering caused by the breach in addition to the damages normally recoverable, since "personal" contracts involve the plaintiff’s interests of "personality" and damages for mental suffering are foreseeable. Examples of "personal" contracts are contracts to marry, contracts between hotels or common carriers and their guests, contracts for medical services, and contracts for the disposition of corpses.

Insurance contracts, on the other hand, have generally been held to be commercial in nature; therefore, the insured party’s recoverable damages historically have been quite limited. He can neither recover for mental suffering caused by the

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8 Farnsworth, Legal Remedies for Breach of Contract, 70 Colum. L. Rev. 1145, 1199-1203 (1970). These damages may include consequential damages in addition to the amount of the contract itself whenever such consequential damages were reasonably foreseeable by the breaching party at the time the contract was made. Id. at 1202-03.


10 Corbin § 1076, at 429; McCormick § 145, at 593; Williston § 1341, at 216.

11 Corbin § 1076, at 429; McCormick § 145, at 593-94; Williston § 1341, at 216-17.

insurer's refusal to pay under the policies nor recoup the financial losses caused by such actions.

Punitive damages likewise are not generally assessed for breach of contract. However, in an effort to protect the public from delays in payment utilized by insurance companies to force favorable settlements, some states have enacted statutes authorizing an assessment of limited punitive damages against recalcitrant insurance companies. These damages, consisting of a penalty and an award of attorney fees, are payable where the insurer fails or delays in bad faith to pay a claim. Generally, though, the statutory penalties for vexatious refusal to pay a claim are not inflicted unless the evidence shows that the refusal was willful and without reasonable cause, and it is not enough merely that the judgment after trial is against the insurer.

B. Tort

In spite of the penalty statutes enacted by states, the remedies for breach of contract have proven to be an ineffective means of redressing the insured's injuries. Because of this, many policy holders have recently turned to the law of torts to find a more satisfactory basis of recovery.

The tort action that appears to be most promising as a means of aiding the beleaguered insured is "the intentional infliction of emotional distress." Because of the difficulty of proving mental injuries and of measuring damages, and the fear of opening the door to fictitious and trivial claims, only recently have courts recognized this as a distinct and sufficient cause of action in and of itself. The first movement in that

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13 Corbin § 1077, at 438; Williston § 1340, at 209-11.
16 Id. at 720.
17 This tort is variously called the intentional infliction of mental distress, mental suffering, mental anguish, mental disturbance or emotional distress. For the sake of consistency, it will be referred to throughout this Note as the intentional infliction of emotional distress.
18 W. Prosser, Handbook on the Law of Torts § 12, at 50-51 [hereinafter cited as Prosser]; Restatement (Second) of Torts § 46, at 22 (Tent. Draft No. 1, 1957) [hereinafter cited as Restatement].
direction occurred in cases holding common carriers liable for insulting remarks made to passengers by their employees.\(^9\) This liability for using profane language or grossly insulting people of ordinary sensibilities has been extended to innkeepers and public utilities\(^9\) and has been applied even in situations where the mental disturbance was not evidenced by any physical illness. In such cases the liability is imposed because of the special obligation of the particular defendant to the public.\(^21\)

The courts are in virtually unanimous agreement, however, that an ordinary defendant cannot be held liable for the intentional infliction of emotional distress unless the plaintiff's evidence satisfies a much more stringent standard.\(^22\) It is not enough that he show that the defendant intended to cause the mental distress or that his conduct could be characterized as malicious. For the plaintiff to recover, he must demonstrate that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."\(^23\)

According to the late Dean Prosser and the *Restatement (Second) of Torts* [hereinafter *Restatement*], the presence of either or both of two factors, tends to make a finding of outrageous conduct on the part of the defendant more likely. The first factor consists of the abuse of some relationship or some position of power held by the defendant which gives him the means of injuring the plaintiff.\(^24\) This factor has served as the basis for imposing liability on collection agencies for using high-pressure methods of collection and on insurance adjusters for attempting to coerce insured parties into settlements. Such liability is usually based on a prolonged course of harassment including such conduct as threats of arrest, threats to ruin one's credit rating or to file a lawsuit, or attempts to exert

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\(^9\) Prosser § 12, at 53; Restatement § 48, at 34.

\(^11\) Prosser § 12, at 53; Restatement § 48, at 34.

\(^21\) Prosser § 12, at 54-55; Restatement § 46, at 22.

\(^22\) Restatement § 46, at 22; Prosser, *Insult and Outrage*, 44 Calif. L. Rev. 40, 43 (1956).

\(^23\) Prosser § 12, at 56; Restatement § 46, at 24; Prosser, *Insult and Outrage*, supra note 23, at 47.
pressure by involving the insured’s employer, relatives and friends.\textsuperscript{25} Even in cases of this type, however, there still must be extreme and outrageous conduct; mere rude conduct is not sufficient to allow recovery. Likewise, the defendant is not liable when he does no more than what he has a legal right to do.\textsuperscript{26}

The second factor which, when present, often provides the requisite degree of “outrage” is knowledge on the part of the defendant that the plaintiff is particularly susceptible to emotional distress due to some physical or mental condition.\textsuperscript{27} Although threatening or abusive language does not generally constitute conduct sufficiently outrageous to form the basis for a cause of action, it has been so held in a number of cases involving sick people, children, and pregnant women where the defendant was aware of the condition.\textsuperscript{28}

Once it has been established that the defendant’s conduct was indeed extreme or outrageous, it must be determined whether or not the plaintiff actually suffered severe emotional distress. When the tort of intentional infliction of emotional distress first came to be recognized, it was necessary that such distress be evidenced by some physical illness. It was only in 1948 that the Restatement was modified to reflect the fact that a physical illness is no longer required by a substantial number of jurisdictions.\textsuperscript{29} However, it appears that where the conduct is not clearly outrageous, the courts impose a correspondingly greater requirement of physical distress. Conversely, if the enormity of the outrage is clear, bodily harm is not required.\textsuperscript{30}

\section*{II. Development of Insurer’s Liability in California}

In deciding \textit{Gruenberg v. Aetna Insurance Co.},\textsuperscript{31} the Supreme Court of California relied mainly on four California cases: \textit{Richardson v. Employers Liability Assurance Corp.},\textsuperscript{32}

\begin{itemize}
  \item Prosser § 12, at 57; Prosser, \textit{Insult and Outrage}, supra note 23, at 48-49.
  \item Prosser, \textit{Insult and Outrage}, supra note 23, at 49-50.
  \item Prosser § 12, at 58; \textit{Restatement} § 46, at 25; Prosser, \textit{Insult and Outrage}, supra note 23, at 51. See also \textit{Restatement} § 46, at 25 (illustrations 10-14).
  \item \textit{Restatement of Torts} § 46 (Supp. 1948). This statement has been retained in § 46 of \textit{Restatement (Second) of Torts} (Tent. Draft No. 1, 1957).
  \item Prosser § 12, at 59.
  \item 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).
  \item 102 Cal. Rptr. 547 (Cal. Ct. App. 1972).
\end{itemize}
**Fletcher v. Western National Life Insurance Co.,**33 **Crisci v. Security Insurance Co.,**34 and **Comunale v. Traders & General Insurance Co.**35 In **Comunale** and **Crisci** the court considered the duty of an insurance carrier to accept reasonable settlements under liability policies protecting the insured against third parties. In **Richardson** and **Fletcher,** on the other hand, the court was concerned with the duty of a carrier to refrain from unreasonably withholding payments due under first party policies requiring payment to the insured. The court in **Gruenberg,** however, found that these two duties were merely parallel aspects of the same obligation—the responsibility implied by law in every insurance contract “under which the insurer must act fairly and in good faith in discharging its contractual responsibilities.”36 Thus, despite some differences in the precise issues considered, all four cases were pertinent to the **Gruenberg** decision and a discussion of each of them is essential to understanding the development of the law of insurer’s liability in California.

A. **Comunale v. Traders & General Insurance Co.**

In **Comunale** the California Supreme Court discussed at some length the implied covenant of good faith and fair dealing required under every contract and for the first time analyzed this duty as it applies to insurance contracts. This covenant requires the insurer to settle when it is possible and when it seems to be the most reasonable manner of disposing of the claim even if the express terms of the policy do not impose such a duty. The court stated that when deciding whether to compromise a claim, the insurer must give at least as much consideration to the insured’s interests as it does to its own.37 In addition, the court found that an insurer who denies coverage does so at its own risk and will be held liable for all damage suffered by the insured party even when the denial of coverage is not entirely groundless.38 Indeed, in **Comunale** the insurer

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34 426 P.2d 173, 58 Cal. Rptr. 13 (1967).
35 328 P.2d 198 (Cal. 1958).
36 510 P.2d at 1037, 108 Cal. Rptr. at 485.
38 Id. at 202.
had denied coverage and refused to defend a suit against the insured, because it believed that the accident, having occurred while the insured was driving a truck which did not belong to him, was not covered by the policy. The court, however, declared that an insurer's reasonable belief as to lack of coverage is no defense if in fact it is erroneous. Since the trial court determined that the accident was covered by the policy, the company's belief was erroneous and it was therefore liable for the entire judgment against the insured even though it exceeded the policy limits.

The precise holding in Comunale is that a liability carrier cannot escape its obligation to settle within policy limits by refusing to defend its insured. The court further stated that when there is no opportunity to settle the claim within policy limits and there is only a breach of the duty to defend, the liability of the insurer would be restricted to the policy limits plus attorneys' fees and court costs since this is the only damage suffered by the insured. However, when there is also a refusal to accept an offer of settlement within policy limits, this latter refusal is the determinative factor in fixing the extent of the insurer's liability and the insurer should be held liable for the entire judgment against the insured.

In addition to the implied covenant of good faith, there was yet another important dimension to Comunale. While most actions for wrongful refusal to settle are pursued as tort claims, the complaint in Comunale was based on breach of contract, since otherwise the suit would have been barred by

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30 Id. at 198. It is generally held that an insurance carrier has a duty to attempt to settle a claim within policy limits. This duty arises out of the exclusive power given by the terms of the policy to the insurance company with respect to settlement of a claim. See Annot., 40 A.L.R.2d 168, 178 (1955); Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136 (1954) [hereinafter cited as Keeton]. When the insurer wrongfully refuses to settle within policy limits, the insurer is generally held liable for the entire judgment entered against the insured even when it exceeds policy limits. Annot., 40 A.L.R.2d 168, 171-72 (1955). There is a difference of opinion, however, as to whether liability should be restricted to the exercise of good faith or whether there should be liability for negligence in rejecting an offer to settle a claim regardless of good faith. Annot., 40 A.L.R.2d 168, 171 (1955); Keeton, supra, at 1139-40. California, along with the majority of jurisdictions, rejects the negligence test and only requires good faith in refusing a settlement offer. Brown v. Guarantee Ins. Co., 319 P.2d 69 (Cal. 1958); Annot., 40 A.L.R.2d 168, 171 (1955).

31 328 P.2d at 201.

32 Id. at 201-02.
the statute of limitations. The court upheld this approach, declaring that such an action sounds both in contract and in tort and that the plaintiff may choose to proceed under either of these theories. This represents a marked change from the general rule that such a cause of action sounds only in tort. The court, in effect, changed the insurer's right to settle into a contractual duty.

As noted earlier, damages for breach of contract are generally limited to the amount of the contract plus interest. Here, however, the recovery was for the entire judgment entered against the insured, including the excess over policy limits. This "excess" recovery was allowed, the court explained, in view of a California statute which defined the measure of damages for a breach of contract as that amount which will compensate the party aggrieved for all the detriment proximately caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach. Moreover, the court found that recovery in excess of policy limits was possible in spite of another section of the California Civil Code which provided that a person could not recover a greater amount in damages for breach of an obligation than he could have gained by full performance. The court reasoned that permitting a recovery in excess of the policy limits would indeed place the insured in the same position that he would have been in if there had been full performance under the contract.


The next case relied upon by the Gruenberg court was Crisci v. Security Insurance Co. In affirming a verdict $91,000 in excess of the policy limits, the court reiterated its statement in Comunale that an action for wrongful refusal to settle may be brought either in tort or in contract and disapproved con-

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42 Id. at 203. The court pointed out that such election is not available when the tort character of the action prevails as in suits for personal injury caused by negligence. Id.
Keeton, supra note 39, at 1138 n.5; Comment, Liability of Insurer for Failure to Settle, 34 N.Y.U.L. Rev. 783 (1959).
Id. at § 3358.
trary language in *Critz v. Farmers Insurance Group*, a California District Court of Appeal decision, that might be interpreted as providing that such a cause of action sounds only in contract. In addition to the excess recovery, the court approved a $25,000 verdict for mental distress induced by the insurance carrier's refusal to accept a $9,000 offer of settlement (with Mrs. Crisci offering to pay $2,500 of the amount), a figure within the limits of a $10,000 liability policy covering an apartment building owned by Mrs. Crisci. Mrs. DiMare, a tenant who was injured in a fall on a staircase outside the building, had sued Mrs. Crisci seeking damages for physical injuries as well as for a severe resulting psychosis. Security's highest offer of settlement was for $3,000 despite the fact that its lawyer and adjusters advised that a verdict would likely exceed $100,000 if, in regard to the alleged psychosis, the jury believed Mrs. DiMare's expert witnesses. After a jury verdict in favor of Mrs. DiMare for $101,000, Mrs. Crisci, an immigrant widow of 70, lost her apartment building, became indigent and dependent upon her grandchildren and attempted suicide several times.

Based on these facts, Mrs. Crisci argued that an insurance carrier should be held absolutely liable for any excess judgment when the carrier refuses to settle within policy limits. The court did not actually reject such a rule and noted several arguments in favor of a rule of this kind. However, the court found it unnecessary to impose absolute liability in this case since it determined that Security should be held liable for a breach of its duty as enunciated by *Comunale* to give as much weight to the interests of its insured as it gave to its own. Since Security's belief that the plaintiff had no chance of winning the suit was unreasonable under the circumstances, it was held liable for the excess judgment.

In affirming the award for mental suffering in addition to the excess judgment, the *Crisci* court took *Comunale* one step further and broadened the scope of allowable damages in an action against the insurer for refusal to settle. While noting

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426 P.2d at 178, 58 Cal. Rptr. at 18.
52 DiMare v. Cresci, 373 P.2d 860, 23 Cal. Rptr. 772 (1962). In the first suit, the insured was sued as "Rosina Cresci".
51 426 P.2d at 177, 58 Cal. Rptr. at 17.
52 Id. at 178, 58 Cal. Rptr. at 18.
that damages for mental suffering are most commonly awarded in connection with physical injury resulting from negligent or intentional misconduct, the court recognized that in several cases the California courts had approved an award of damages for mental suffering where there was a tortious interference with property rights without personal injuries apart from the mental suffering. Furthermore, in support of its decision the court invoked the broad principle that an injured party should be compensated for all damage proximately caused by a wrongdoer. Moreover, the court held that if the conduct is tortious an award for mental suffering will be approved despite the fact that the conduct also involves a breach of contract. While observing that the denial of damages for mental suffering resulting from breach of contract is generally based on the theory that allowing such damages would open the door to fictitious claims, the court found that when there is "tortious conduct resulting in substantial invasions of clearly protected property interests" in addition to a breach of contract, the danger of fictitious claims is reduced and damages for mental suffering should be allowed.

It has been asserted that the approval by Crisci of an award of damages for mental suffering places insurance contracts into the realm of "personal" contracts for the first time. However, this contention would mean that damages for mental suffering would be permitted for breach of any insurance contract. This writer does not believe the court intended this to be the case. The court seems to have carefully restricted recovery of mental suffering for breach of contract to those cases where there is also tortious conduct which results in "substantial invasions of clearly protected property interests." Thus, unless the court interprets any breach of an insurance contract to be a substantial interference with clearly protected property inter-

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53 Id., 58 Cal. Rptr. at 18.
54 Id., 58 Cal. Rptr. at 18.
55 Id. at 179, 58 Cal. Rptr. at 19 (footnote omitted).
56 Id.
57 Note, Damages for Mental Suffering Caused by Insurers: Recent Developments in the Law of Tort and Contract, 48 NOTRE DAME LAW. 1303, 1304-05 (1973). For a discussion of "personal" and "commercial" contracts, see text accompanying notes 9-12 supra.
58 426 P.2d at 179, 58 Cal. Rptr. at 19 (footnote omitted).
ests, damages for mental suffering would not always be allowed for breach of an insurance contract.

C. **Fletcher v. Western National Life Insurance Co.**

The third case relied upon by the court in the *Gruenberg* case was *Fletcher v. Western National Life Insurance Co.*, a case in which the insured party sought compensatory and punitive damages from his insurance carrier for alleged intentional infliction of emotional distress. Whereas in *Crisci* mental suffering was incidental to other damages, in *Fletcher* mental suffering constituted the cause of action itself. The insured, a 41-year-old common laborer with eight children, earned about $289.00 a week by working 70 to 80 hours. Desiring to protect his family, he purchased disability insurance from the defendant insurance company. The policy provided for payments of $150 per month for as long as he should be totally disabled from sickness or injury. If the disability were due to sickness, the payments were to be limited to two years. If injury caused the disability, however, the payments would continue for 30 years.

The plaintiff sustained a back injury in the course of his employment and was unable to work again. Doctors who examined him were virtually in unanimous agreement that he was disabled because of the injury to his back. Despite the overwhelming medical evidence, the insurance company undertook a concerted course of action designed to persuade the claimant to surrender his insurance policy or enter into an unfavorable settlement. The insurance company, seizing upon a statement made by one of the consulting physicians which indicated that his back problem might be related to a congenital back ailment, determined that the plaintiff should be paid under the sickness provision. In addition, the insurance company accused him of a misrepresentation in his application for the insurance since he did not disclose this congenital back ailment even though it was abundantly clear that he had not been aware of the ailment at the time he applied for the insurance. The company eventually terminated the disability payments and demanded that the plaintiff return any sums that he had already received.

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In his suit against the insurer, the plaintiff alleged that the insurer had maliciously and in bad faith refused to pay benefits to which he was entitled. The company conceded that its conduct was deplorable and outrageous, but a claim supervisor for the company testified that in another case with the same facts he would undertake the same course of conduct as that used against the insured in this case. After considering the facts, the jury returned a verdict of $60,000 compensatory damages and $650,000 punitive damages, but the plaintiff accepted a remission of the punitive damages to $180,000.60

On appeal a primary issue was whether the action sounded in tort or in contract. It was argued that the cause of action sounded solely in contract and therefore that the award of punitive damages and damages for mental suffering should not be allowed to stand. However, the court, deciding to extend the Crisci holding to disability insurance contracts, held that the action sounded in tort even though it may also have constituted a breach of contract and that the actions of the insurance company could legally form the basis for a claim for damages for intentional infliction of emotional distress.61 Noting that the decision could probably rest solely upon the foregoing holding, the court held additionally that, independent of the tort of intentional infliction of emotional distress, the conduct of the disability insurer constituted a "tortious interference with a protected property interest of its insured for which damages may be recovered to compensate for all detriment proximately resulting therefrom"62 including economic loss, emotional distress, and punitive damages. The court reasoned that in a case such as this the invasion of economic interests might well outweigh the direct invasion of emotional tranquility. Hence, the dual holding of Fletcher would permit recovery in future cases.

60 Id. at 82; see also Wetherbee v. United Ins. Co., 95 Cal. Rptr. 678 (Cal. Ct. App. 1971), where an award of $1,050 compensatory and $200,000 punitive damages was upheld against a disability insurer for fraudulently inducing an insured not to cancel the policy by knowingly false representations that the policy would pay lifetime benefits if the insured were permanently disabled; and 37 Cal. Rptr. 585 (Cal. Ct. App. 1964) where the court, though finding the award excessive, held that an award of punitive damages was supported by the evidence since the agent of the insurer fraudulently misrepresented that all medical bills incurred by the insured and his family would be paid regardless of the existence of other collectible insurance.

61 89 Cal. Rptr. at 93.

62 Id. at 93-94.
for all types of injury suffered. In this second holding the court applied the California Supreme Court's rule set forth in *Crisci* that recovery will be permitted for the tortious interference by an insurance company with a protected property interest of its insured. The court explained that this rule, which redirected judicial emphasis and allowed recovery of all proximately caused detriment in a single cause of action, would foster public respect for and confidence in the judicial process more than a rule which required attorneys, litigants and judges "to force square pegs into round holes." Obviously disturbed at the injury being suffered by insured parties at the hands of some insurance carriers, the court went beyond the point necessary for a decision in the case in order to increase the cause of action available to an insured.

As noted earlier, two factors are listed by the late Dean Prosser and the *Restatement* as being significant in determining whether liability should be imposed for intentional infliction of emotional distress. Both factors were found to be present in *Fletcher*. The first factor, it will be recalled, is the abuse of the relationship between the parties or the abuse of a position of power enjoyed by the defendant. In *Fletcher* the court stated that an insurer has a special relationship with its insured with certain concomitant implied duties owed to the insured. This relationship arises to some extent out of the great disparity in economic situations between the two parties and to some extent out of the fact that the insured party does not contract to obtain a commercial advantage but merely to protect himself against the risk of accidental loss. Hence, by the very nature of the contract, the issuer of an insurance contract is particularly vulnerable to a claim of oppressive tactics and outrageous conduct.

The second significant factor was present since the plaintiff was found to be particularly susceptible to emotional distress due to his disabled and impecunious condition, and the

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63 See text accompanying notes 56-59 supra. Notice that this second holding was later interpreted by the California Supreme Court as a finding that the insurer had breached its duty of good faith and fair dealing. Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037, 108 Cal. Rptr. 480, 485 (1973).

64 89 Cal. Rptr. at 94.

65 See text accompanying notes 25-29 supra.

66 89 Cal. Rptr. at 93.
defendants were well aware of this condition. This susceptibility to emotional distress precipitated by the insured party's impecunious position is very likely to be present in any case of an insurance company's failure to pay under a policy; therefore, there is an increased likelihood that under similar circumstances any insurance company's conduct will be found to be outrageous.

In addition to the two factors just discussed, it has been argued that a third factor, one which occupied a position of preeminence in Crisci and Comunale, influenced the Fletcher court even more. This factor was the implied-in-law duty of good faith and fair dealing owed by an insurer to its insured. This duty, as explained by the court in Fletcher,

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.

Notably, Fletcher's suit was based upon the insurer's bad faith interpretation of the medical reports and its attempt to reduce its liability based on this interpretation. Such conduct, though possibly unethical, is legally permissible and employed in many situations; however, these tactics were not tolerated in Fletcher because of the duty of good faith and fair dealing owed by an insurer to its insured.

D. Richardson v. Employers Liability Assurance Corp.

In Richardson v. Employers Liability Assurance Corp., the fourth in the series of California cases figuring heavily in Gruenberg, two plaintiffs, husband and wife, sought compensatory and exemplary damages against their insurance carrier who had deliberately withheld a payment of $20,000 due under an uninsured motorist clause. The company had persisted in its refusal to pay even though it had been repeatedly advised

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67 Id. at 91.
69 89 Cal. Rptr. at 93.
70 Keenan & Gillespie, supra note 68, at 340.
by its local office that the claim was perfectly valid. By so doing, it forced the plaintiffs to invoke an arbitration provision in the policy applicable in case of disagreement between the insured and the insurer. After the arbitrator awarded plaintiffs the full policy limits, the insurance carrier ordered its local office to make the best possible settlement. The plaintiffs were thus finally able to collect the payments due only after the expenditure of considerable effort and the passage of over a year, despite the fact that the insurance company was cognizant of the validity of their claim within two months after the accident.

The actual damages suffered by the plaintiffs due to the defendant’s failure to settle the claim without arbitration were $1,996.93, which included attorneys’ fees and the plaintiffs’ share of the cost of the arbitration proceedings. At the trial the jury rendered verdicts of $10,000 (the policy limits) for each plaintiff against the insurance company for its failure to settle in good faith. Moreover, the jury also returned a general verdict in the amounts of $75,000 for the husband and $100,000 for the wife.

On appeal the intermediate appellate court found that “[t]his conduct toward its own insured was unconscionable, and constituted a tortious breach of contract.”72 As in previous cases of this type, the defendant argued that the plaintiffs’ action was for breach of contract and that punitive damages were not authorized. As the California courts had done several times before, however, the court held that the suit rested upon a tortious breach by the insurer of its obligation to deal fairly and in good faith with its own insured; the fact that the conduct also constituted a breach of an implied covenant did not prevent the recovery of punitive damages.73 The court found, moreover, that an award of punitive damages was justified since the conduct of the insurance company constituted oppression and since, in addition, malice could be inferred from the circumstances of the case.74

In spite of the above findings, the case was remanded for retrial on the issue of damages. The court explained that “[t]o

72 Id. at 552.
73 Id. at 556.
74 Id.
support an award for anxiety and emotional distress, there must be evidence of 'severe emotional distress' . . . .''

The evidence in the instant case regarding anxiety and emotional distress consisted only of testimony by Mrs. Richardson that as a result of the insurance company's refusal to pay their claim, creditors had pressed the Richardsons to pay their bills and that the plaintiffs had had to borrow money to pay taxicab fares and parking expenses incurred in obtaining medical treatment for their injuries. The court found that this evidence was not sufficient to support an award for anxiety and emotional distress; therefore, since it was not possible to determine from the general verdict how much of the award was for anxiety and emotional distress, the case was remanded for retrial on the issue of damages. Thus the intermediate appellate court imposed upon the plaintiffs the restrictive requirements held in Fletcher to be necessary for an award of damages for mental suffering even though two entirely different causes of action were involved; Fletcher involved an action for intentional infliction of emotional distress, whereas the cause of action in Richardson was for breach of the duty of good faith and fair dealing.

E. Gruenberg v. Aetna Insurance Co.

This series of California cases culminated in the decision of Gruenberg v. Aetna Insurance Co., the facts of which were outlined earlier. Gruenberg, claiming that he had suffered "severe economic damage", 'severe emotional upset and distress', loss of earnings and various special damages, sought compensatory and punitive damages for the outrageous conduct of the defendants. He alleged that the defendants acted

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76 Id. at 553.
77 Id. at 557.
78 The quoted language from Richardson requiring evidence of severe emotional distress to support an award for anxiety and emotional distress was expressly disapproved by the California Supreme Court in Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).
80 See text accompanying notes 3-5 supra.
81 510 P.2d at 1035, 108 Cal. Rptr. at 483.
intentionally and in bad faith for the sole purpose of depriving him of the benefits of the fire insurance policies issued by the insurance companies, thereby breaching their duty of good faith and fair dealing.

Gruenberg's complaint was dismissed by the trial court, and the dismissal was affirmed by the intermediate appellate court on the ground that the defendants' conduct could not be considered so outrageous as to constitute a basis for suit in tort. The California Supreme Court, however, upheld the complaint against the recalcitrant insurance companies and remanded the case to the trial court.

The court discussed at length each of the California cases heretofore analyzed and found a common legal principle underlying each of them:

... [I]n every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.

The court held that since Gruenberg had indeed alleged facts sufficient to constitute a breach of this duty, he was entitled to a trial on the issues.

The insurance companies countered by claiming that Gruenberg's failure to submit to an examination under oath as required by the "cooperation and notice" clause of the California Insurance Code acted as a bar to his cause of action. They contended that since plaintiff breached his contractual duties, their duty of good faith and fair dealing was excused. The California Supreme Court found, however, that the insurer's duty is absolute, implied by law in every insurance contract, and that the nonperformance by the insured of his contractual duties does not excuse a breach of the duty of good faith and fair dealing by the insurer while the contract is still in effect.

The defendants next argued that Gruenberg could not re-

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83 510 P.2d at 1038, 108 Cal. Rptr. at 486.
84 See note 4 supra.
85 510 P.2d at 1040, 108 Cal. Rptr. at 488.
cover for mental suffering since he had not alleged conduct on their part which was "extreme" or "outrageous". The court, unexpectedly, found that there was no need for a showing of extreme or outrageous conduct. This was predicated on the fact that Gruenberg's suit was not founded on the tort of intentional infliction of emotional distress but instead was based on a separate tort formerly recognized by the court in Crisci. Quoting from Crisci, the court explained 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 pecuniary loss but also for his mental distress." Moreover, when these elements are present it is not necessary for recovery that there be outrageous conduct or that the mental distress be severe.

The court noted that a distinction must be made between those cases, as in Fletcher, which are based solely on the tort of intentional infliction of emotional distress and those cases such as Crisci where other interests have been invaded and emotional distress is merely an element of damages. The court intended no change in the requirement, as set out in Section 46 of the Restatement (Second) of Torts, that, when the action is based solely on the tort of intentional infliction of emotional distress, there must be a showing of intentional, extreme or outrageous conduct which causes severe emotional distress to support a recovery. However, since Gruenberg sought recovery, not for the independent tort of intentional infliction of emotional distress, but for mental distress resulting from a "substantial invasion of property interests," he could recover damages for mental suffering whether or not the action of the insurance companies was "extreme" or "outrageous". The court, in reaching this decision, specifically disapproved of language in Richardson which indicated that a plaintiff must prove a case of outrageous conduct in order to be awarded damages for emotional distress in a suit against an insurer for breach of his duty of good faith and fair dealing.

As a result of Gruenberg, the California Supreme Court

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87 510 P.2d at 1041, 108 Cal. Rptr. at 489.
88 Id., 108 Cal. Rptr. at 489.
89 See text accompanying notes 79-82 supra.
90 510 P.2d at 1042 n. 10, 108 Cal. Rptr. at 480 n.10.
has now extended this new tort of breach of the duty of good faith and fair dealing to an unprecedented degree. This tort, first applied to insurance contracts by the California Supreme Court in 1958 in *Comunale v. Traders & General Insurance Co.*, has no longer requires a showing of outrageous conduct on the part of the insurer to support a recovery for mental suffering so long as there has been a "substantial invasion of property interests of the insured." This does not seem to be a very restrictive requirement, since there is likely to be a substantial invasion of the insured's property interests in every case in which the insurer refuses to pay under an insurance policy. Hence, the California Supreme Court appears to have opened a wide door through which insured parties may bring actions against recalcitrant insurance companies.

### III. Development of Insurer's Liability in Other States

While few states have followed California's lead in liberally broadening the scope of insurer's liability, there does seem to be a trend developing in several states to extend an insurer's liability to some degree. Although most states still view an action by an insured against its insurer for delay or refusal to make payments due under a policy as one solely in contract with the accompanying limitations on recoverable damages, some courts have held that consequential damages, damages for mental suffering and even punitive damages are recoverable against a refractory insurance company.

#### A. Damages for Mental Suffering

The courts of several states have held that damages for mental suffering are recoverable against a recalcitrant insurance company. However, the court that has taken the biggest step in following the lead of the California courts is the United States Court of Appeals for the Seventh Circuit applying Illinois law. In *Eckenrode v. Life of America Insurance Co.*, the plaintiff sought damages for severe emotional injury suffered as a result of the insurer's outrageous conduct in refusing to pay

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1. 328 P.2d 198 (Cal. 1958).
2. 510 P.2d at 1041, 108 Cal. Rptr. at 489.
3. 470 F.2d 1 (7th Cir. 1972).
the proceeds of a $5,000 policy covering the life of her husband. The policy stated that the proceeds were payable upon proof of death from accidental causes; however, when the plaintiff submitted a claim after her husband was the victim of a homicide, the insurer repeatedly refused to make payment and attempted to coerce her into compromising the claim even though it was fully aware that she had a valid claim and that she was in dire financial straits. By reason of the insurance company's failure to pay her claim she had no money for funeral expenses, had to borrow money to support her children, and had to live with and accept charity from her family, all of which caused her to suffer severe mental distress.

Anticipating how the Illinois Supreme Court would decide the case, the Seventh Circuit found that on the facts presented plaintiff could recover damages for severe mental distress alleged to be the result of the insurer's conduct. Noting that the Illinois Supreme Court had eleven years before recognized the tort of intentional infliction of emotional distress,²⁴ the Seventh Circuit opined that the Illinois Supreme Court, finding that the facts alleged constituted such a tort, would follow the California courts in applying the tort of intentional infliction of emotional distress to insurance contracts.

In so finding, the Seventh Circuit relied heavily upon the decisions of the California courts in Crisci v. Security Insurance Co. and Fletcher v. Western National Life Insurance Co. The Eckenrode court found, as had the Fletcher court, the presence of the two factors mentioned earlier which make one's conduct particularly susceptible to a finding of outrage. The court detected an abuse of the insurance company's position of power when it attempted to delay payment and to increase plaintiff's financial distress by forcing an unfavorable settlement. In addition, the court stated that since the very purpose of the insurance was to alleviate the beneficiary's critical financial circumstances upon her husband's death, the insurance company was on notice that plaintiff would be particu-
larly susceptible to mental distress due to her financial plight.\textsuperscript{100}

To further support its holding, the court observed in passing that the insurance industry affects many people and is "stamped with a public interest."\textsuperscript{101} They also noted, without attaching to it the importance accorded it by the California courts, the fact that insurance contracts are subject to implied conditions of good faith and fair dealing and that the action sounds both in contract and tort.\textsuperscript{102} It has been suggested the court indicated that, in addition to a tort claim, an action in contract would lie against an insurance company for breach of the duty of good faith and fair dealing and that mental distress would be a foreseeable result of a breach of those implied duties due to the very nature of the risks insured against it.\textsuperscript{103} If such was indeed the intention of the court, it would bring this case into even closer alignment with the California decisions and would constitute a significant change in the damages normally recoverable for breach of an insurance contract.\textsuperscript{104}

The Court of Appeals of Michigan has also held that an insured party may recover for mental suffering caused by an insurance company's wrongful acts, provided such acts were done with the intent of causing mental suffering. In \textit{Frishett v. State Farm Mutual Automobile Insurance Co.},\textsuperscript{105} the court held that a complaint stated a cause of action where the plaintiff alleged that the defendant insurer, who was the insurance carrier for both vehicles in an automobile collision, wrongfully withheld medical payments, made false statements, and obtained information of a private nature to use against the plaintiff in her suit against the driver of the other automobile. The plaintiff claimed that as a result of this conduct she suffered emotional distress. Since the complaint alleged that the defendant \textit{intended} to inflict extreme mental suffering, the court found that the case was distinguishable from a prior decision of that court in which it was held that there could be no recov-
ery for mental distress unless accompanied by physical injury.\textsuperscript{106} Hence, the court found that the law of Michigan does recognize the tort of intentional infliction of mental suffering and this tort would apply in the insurance contract context.\textsuperscript{107}

The United States District Court for Connecticut, applying general principles of Connecticut law, has also joined the trend by extending the tort of intentional infliction of emotional distress to the area of insurance contracts.\textsuperscript{108} In defining the duty of an insurer to its insured, the court stated that an insurer must consider the insured's interests equally with his own and that if the insurer fails to exercise "good faith or due care" in determining whether to accept an offered settlement, the insured may have a cause of action in tort, contract, or both.\textsuperscript{109} Applying this principle to the case before it, the court found that an insured may recover damages for intentional infliction of emotional distress for the insurer's failure to defend and failure to settle the suit within policy limits. In finding that such a recovery would be allowed, the court imposed the restriction that the emotional distress must be shown to be "the foreseeable and proximate result of the defendant's intentional, wanton or willful wrongful conduct."\textsuperscript{110} Noting that the plaintiff's burden might be difficult to meet, the court, nevertheless, found that the plaintiff had stated a cause of action.

Another court which recognizes a cause of action for emotional distress is the United States District Court for the District of Oregon. In \textit{Brown v. First Insurance Co.},\textsuperscript{111} it held that under either Washington or Hawaii law (the two states having a relationship to the occurrence) a plaintiff can generally recover damages for emotional distress if the defendant's conduct is malicious or in reckless disregard of plaintiff's rights. Although indicating that such a rule of law extended to suits under an insurance contract and that recovery for emotional distress would be granted in a proper case, the court stated that

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\textsuperscript{106} See Nelson v. Crawford, 81 N.W. 335 (Mich. 1899).
\textsuperscript{107} 143 N.W.2d at 614.
\textsuperscript{109} Id. at 871.
\textsuperscript{110} Id. at 872.
\textsuperscript{111} 295 F. Supp. 164 (D. Ore. 1968), rev'd on other grounds, 424 F.2d 680 (9th Cir. 1970).
in the case at bar the plaintiffs had not sustained their burden of proof. The tortious conduct alleged was that the company failed to notify plaintiffs that the company was denying coverage until four months after the company decided there was no coverage. The court ascertained, however, that since the evidence was confusing as to when the insurance company learned of the lack of coverage, it could not be held that the company did indeed knowingly withhold notice of the non-coverage for four months. Hence, the court did not permit recovery for emotional distress because the defendant was not shown to have acted maliciously or in a reckless disregard of plaintiff's rights.

In a final case of this type,112 the Court of Appeals of Louisiana upheld an award of $750 for humiliation against an insurer for wrongful refusal to pay a judgment rendered against the insured. Upon being sued by the other party to an automobile collision, the insured, Hinson, notified his insurance agent. The agent failed to forward notification to the insurer, and a default judgment of $465.70 plus costs and interest was entered against Hinson. Thereafter, Hinson's wages were garnished; and since he could not satisfy the judgment, his driver's license and car licenses were revoked. Even though Hinson demanded that the insurance company pay the judgment, they refused to do so.

At trial it was determined that since the insurer's agent was informed of the pending suit, there was sufficient notice to the insurer; the insurer was therefore liable for the amount of the judgment entered against Hinson. In addition, the court, noting that the action was partially in contract and partially in tort, upheld an award for $750 for the humiliation suffered as a result of defendant's conduct.113 While this is admittedly small compensation for the distress suffered by the plaintiff, the path is at least open for such awards in the future, and in

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113 Cf. Bell v. Union Bankers Ins. Co., 213 So. 2d 780 (La. Ct. App. 1968), writ refused, 215 So. 2d 131 (La. 1968); Schecter v. Camden Fire Ins. Assn, 141 So. 2d 451 (La. Ct. App. 1962). The court in Bell, while failing to distinguish the seemingly contrary holding of Hinson, found that the trial court was correct in refusing to hear evidence of plaintiff's claim that defendant insurer's conduct was tortious in refusing to make payment under two health insurance policies. Though finding that the insurer's conduct was arbitrary and unreasonable, which supported a grant of attorney's fees and a penalty of double the amount due under the contract, the court found the action to lie solely in contract.
cases where the conduct of the insurance company is more clearly outrageous, perhaps awards which sufficiently compensate the insured will be granted.

B. Recovery for Punitive Damages

In addition to those states which allow recovery for mental suffering against a recalcitrant insurance company, a few states allow a recovery of punitive damages against such a defendant. In the recent case of *Kirk v. Safeco Insurance Co.*, the Ohio Court of Common Pleas considered a claim against the insurer for failure to pay under a homeowner’s policy for the $4,450 loss sustained by the plaintiffs. The court found that the actions of the insurance company, consisting of a lack of good faith effort to settle, the mailing of a “nasty” letter, and a total lack of intention to honor the insured’s claim, constituted “a breach of contract amounting to a wilful, wanton and malicious tort . . . .” The court, therefore, found that punitive damages of $1,550 should be assessed in addition to attorney’s fees of $2,000. The court stated “very emphatically” that the plaintiffs were insureds of the insurance company—not third party claimants under a liability coverage. Moreover, it observed that “[e]ven under liability coverages, the insurer must act in good faith to protect the interests of its insured.” Thus, although the court seemed to indicate that an insurer owes a greater duty to its insured under an indemnity policy than under a liability policy, in either case the insurer is held to a standard of good faith, a breach of which may result in tort liability.

The Montana Supreme Court in *State ex rel. Larson v. District Court of the Eighth Judicial District* enlarged the number of situations in which exemplary damages can be recovered in suits by an insured against his insurance company. Although expressly stating that it was not changing the general rule in Montana that punitive damages are not recoverable for breach of contract, the court, nevertheless, held that where the actions of the insurance company constituted a violation of the

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2. Id. at 921.
4. 423 P.2d 598 (Mont. 1967).
state insurance laws in addition to a breach of contract, punitive damages are recoverable. Since the Montana insurance statute includes a section requiring that amounts due under a policy, except for amounts for which the policy provides periodic payment, must be paid immediately upon proof of loss, it would appear that in any case of delay or refusal by an insurance company to pay benefits due under a policy there would be a violation of the state insurance law and the insurer would thus be liable for punitive damages. The court thus seems to have greatly increased the opportunities for insured parties in Montana to collect punitive damages as a means of redress for the wrongful acts of insurance companies.

C. Recovery for Consequential Damages

Beyond punitive damages and damages for emotional distress, the courts of two states have held that insured parties should be permitted to recover consequential damages of various types in addition to the amounts due under the insurance policy. Although the cases bear some relevance to this discussion, it should be noted that the courts in these cases have not changed the law in any respect. In each case, the court, finding that the action was solely for breach of contract, applied the generally accepted rules with respect to damages recoverable in such instances. However, the courts recognized that the damages which befell the insured as a result of the insurer’s conduct might have been within the contemplation of the parties when the contract was entered into and, if so, that such damages were recoverable.

In Asher v. Reliance Insurance Co. the insured alleged wrongful conduct on the part of the insurer in failing to make payments amounting to $14,000 due under a fire insurance policy. Although holding that punitive damages and damages for mental suffering were not recoverable in an action for breach of contract, the court, applying Alaska law, held that, in addition to compensatory damages, consequential damages could be recovered if it were found that such damages “were ‘proximately caused’ by or ‘flowed naturally and expectedly’
from the defendant’s breach." \textsuperscript{126} Therefore, the court concluded, the plaintiff’s loss of rents due to the insurer’s failure to pay the amounts due could be recovered if, upon the trial of the matter, it was determined that that kind of damage was within the contemplation of the parties when the parties entered into the contract.

The court in \textit{Asher} also recognized that plaintiff’s action might sound in tort and therefore support a claim for damages for mental suffering and punitive damages if plaintiff could prove, as he alleged, that there was fraud in the inducement of the insurance contract. However, the court did not indicate whether or not the actions of the insurer in refusing to pay the claim constituted tortious conduct.

This same question of consequential damages was confronted by the Court of Appeals of Maryland in \textit{Pennsylvania Threshermen and Farmers’ Mutual Casualty Insurance Co. v. Messenger}. \textsuperscript{121} Therein, the plaintiff’s automobile liability insurer refused to defend a suit brought against plaintiff as a result of his involvement in an accident while driving his truck. Contending that the accident was not covered by the policy, the company also refused to pay the judgment subsequently entered against the insured. As a result of his inability to pay the judgment, the insured lost his truck and trailer; in the ensuing action against the insurer he sought recovery for the cost of these items in addition to the amount due under the policy. Since the policy did not cover damages to insured’s vehicles, the insurer contended that plaintiff should not be able to collect for the truck and trailer. The court, however, after finding that the policy did indeed cover the accident, held that the insured could recover for the damages which naturally arose from the breach of contract on the part of the insurance company. Noting that a plaintiff cannot ordinarily recover damages for the detention of money due him under an insurance policy (other than an allowance for interest), the court, nevertheless, held that when an insurer willfully refuses to perform the obligations of his contract, it will be liable for all loss caused by the breach. Hence, the court here was apparently not concerned, as was the court in \textit{Asher}, with whether the dam-

\textsuperscript{126} Id. at 852.
\textsuperscript{121} 29 A.2d 653 (Md. 1943).
ages were within the contemplation of the parties, as long as they naturally flowed from the defendant's breach.

IV. STATUS OF THE LAW IN KENTUCKY

The Kentucky Court of Appeals, along with the courts of most other jurisdictions, has held that an insurer has a duty to act in good faith when deciding whether to settle a claim against the insured. Like the California courts, the Court of Appeals has found that there is a covenant of good faith and fair dealing implied in every insurance contract which must guide the actions of the insurer in considering whether to settle the claim within policy limits. The Court has not, however, indicated that this implied covenant requires the high standard of conduct on the part of the insurer that is required by the California courts. Neither has it found that a breach of this duty gives rise to liability as extensive as that imposed by the California courts. The general rule in Kentucky is that an insurer will be held liable for any excess judgment entered against the insured party when the insurer in bad faith refuses to settle the claim. Bad faith has been interpreted as something more culpable than mere negligence or error in judgment and has been characterized by the Court of Appeals as follows:

It imports a dishonest purpose of some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will. It partakes of the nature of fraud. . . . It means "with actual intent to mislead or deceive another."

Although repeatedly recognizing the duty imposed upon an insurer when determining whether or not to settle a claim, seldom has the Kentucky Court of Appeals actually imposed

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124 American Sur. Co. v. J.F. Schneider & Son, 307 S.W.2d 192 (Ky. 1957); Georgia Cas. Co. v. Mann, 46 S.W.2d 777 (Ky. 1932).
liability upon an insurer for a breach of this duty.\textsuperscript{127} When such a breach is found, damages are limited to the amount of the judgment entered against plaintiff in excess of the policy limits.\textsuperscript{128} In no case have consequential damages or damages for mental suffering been allowed against an insurer for refusal to settle a claim against its insured within policy limits.\textsuperscript{129}

With regard to the liability of an insurer for refusal to make payments due under a policy, the law in Kentucky is even more restrictive. In such cases the action is generally viewed as one for breach of contract, and damages are generally not recoverable against the intransigent insurance company for its refusal to pay the amounts due under the policy.\textsuperscript{130} In \textit{Clark v. Life \& Casualty Insurance Co.}\textsuperscript{131} the plaintiff sought $5,000 for humiliation and suffering caused by an insurer's wrongful denial of liability under a burial insurance policy taken out on the life of plaintiff's wife. Because the insurer denied liability, the mortician would not extend credit to the plaintiff after the death of his wife; therefore, the plaintiff literally had to beg and borrow money in order to properly bury his wife. Noting that with few exceptions consequential damages cannot be recovered for mere breach of a promise to lend or pay money, the Court held that plaintiff's claim for humiliation and suffering could not stand.

The same result was reached in \textit{Motors Insurance Corp. v. Jackson},\textsuperscript{132} where the Court held that an insurer could not be

\textsuperscript{127} For the only case found in which an insurer was held liable for breach of the duty, see State Farm Mut. Auto. Ins. Co. v. Marcum, 420 S.W.2d 113 (Ky. 1967).


\textsuperscript{129} No case has been found in which such damages were discussed as allowable.

\textsuperscript{130} But see Motors Ins. Corp. v. Howard, 291 S.W.2d 522 (Ky. 1956), where the Court held that under the evidence presented (which was not set out in the case) a verdict of $1,500 could be upheld against the insurer to compensate the insured for loss of the use of his truck resulting from an unreasonable delay by the insurance company in making repairs; see also Service Cas. Co. v. Marcum, 386 S.W.2d 474 (Ky. 1965), where, though recognizing that in light of Motors Ins. Corp. v. Howard, supra, an insurer could "under certain circumstances" be held liable for unreasonable delay in settling a claim, the Court did not find such circumstances present in the case before it and failed to delineate what those circumstances might be.

\textsuperscript{131} 53 S.W.2d 968 (Ky. 1932).

\textsuperscript{132} 340 S.W.2d 610 (Ky. 1960).
held liable for consequential damages resulting from its wrongful refusal to make the payments due under a collision insurance policy. After the insurer’s denial of liability under the policy (based upon alleged misrepresentations in the application for insurance) and its refusal to pay the repair bill for the insured’s truck, the truck was repossessed and sold due to the plaintiff’s failure to pay an installment on the vehicle. The plaintiff sought damages for loss of the truck as well as for loss of earnings resulting from the repossession. While holding that he could recover the amount due under the policy, the Court found that the evidence did not establish that the repossession of the vehicle resulted from the failure of the insurance company to pay the repair bill. It noted, however, without elaboration that even if the evidence had been sufficient to establish that the insurer’s actions caused the loss, there still would have been no liability on the part of the insurer for the consequential damages suffered by the insured.

In *General Accident Fire & Life Assurance Corp. v. Judd* the Court of Appeals concluded that *Jackson* correctly stated the law in this area. Therefore, where the insurance company chose to pay money rather than repair the damaged vehicle, consequential damages awarded to the insured by the jury for storage and loss of use of the vehicle were not allowed to stand even though found to be the result of the insurer’s failure to pay the amount necessary for repairs, as established by estimates obtained by the plaintiff.

The Kentucky Court again stated its position on the allowance of consequential damages for an insurer’s refusal to make payments due under a policy in the recent case of *United States Fidelity & Guaranty Co. v. Fyffe*. In this case, which involved an automobile collision policy, the jury returned a verdict allowing recovery against the insurer for $551 in addition to the amount due under the policy. The additional amount did not represent interest on the money due under the policy but, instead, was awarded to the insured to compensate

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133 400 S.W.2d 685 (Ky. 1966).
134 The Court distinguished *Motors Ins. Corp. v. Howard*, 291 S.W.2d 522 (Ky. 1956), on the ground that in that case the insurance company elected to repair the insured vehicle rather than pay money as in the present case.
135 471 S.W.2d 23 (Ky. 1971).
him for interest which he had paid to a finance company in fulfilling his obligation under a conditional sales contract made when he bought the car. The Court of Appeals, however, viewed the allowance for interest as tantamount to a recovery of consequential damages and therefore reversed the judgment with respect to that element of plaintiff's recovery.

It thus appears that the Kentucky Court of Appeals views an insurance contract as no different than any other contract, allowing no recovery to compensate an insured party for damages resulting from the insurer's delay or refusal to pay amounts due under the policy. Moreover, the insurer is not held to a higher standard than any other party to a contract and is in no way punished for taking advantage of its policyholder.

V. Conclusion

As can be seen by the cases discussed herein, there appears to be a trend developing in various states to impose liability upon insurers for misconduct in dealings with their insureds. Though not calling it such, the California courts have imposed upon every insurer an obligation closely related to a fiduciary duty, and as a result, aggrieved policyholders are now afforded protection against the more powerful insurer. The insurer is subjected to liability for consequential damages, punitive damages and damages for mental suffering if this duty is breached. While the allowance of these damages will serve to better compensate the insured, it should also have a deterrent effect on the unscrupulous conduct of insurers.

In other states which have broadened the insurer's liability to some extent, the insurance company is likewise aware that it must exercise care in its dealings with insured parties lest the insured be permitted to recover substantial damages resulting from extreme misconduct. The insurer will thus be "punished" by having to pay more than the amount of the original claim submitted by the insured.

On the other hand, those states, like Kentucky, that have refused to broaden the scope of the insurer's liability beyond the amount originally due under the policy, often deny helpless policyholders a remedy for the damages caused by insurance companies that take advantage of the very people they have
contracted to protect. Instead, those states are condoning such behavior by the insurers. By refusing in bad faith to pay legitimate claims or by taking advantage of its superior position to attempt to force an unfair settlement, an insurer in such jurisdictions runs the risk of losing no more than it would have if it had made the payments immediately upon submission of the claim. In view of the fact that some claimants may never seek the help of a court in forcing a company to make the required payments, the unscrupulous insurance company, as the law stands today, has nothing to lose and everything to gain by delaying or refusing a claim. Moreover, when an insured is restricted to collecting only the amount due under the policy, it is difficult to believe that he really is getting what he was originally entitled to "if it comes only after years of battling the unarguably superior resources of the company, deducting sometimes-monstrous contingent fees and always-irksome costs, and frequently weathering a plentitude of abuse and harassment in the bargain."\footnote{Lascher, The Imposition of Punitive Damages in the Enforcement of Insurance Contracts, 1971 PROCEEDINGS 220 (American Bar Association Section of Insurance, Negligence and Compensation Law).}

In light of the number of courts that are beginning to recognize that an insurer should be punished for its wrongful activities and that the insured should be sufficiently compensated for the damages suffered as a result of such conduct, it is possible that, if given the opportunity to reconsider the question, the Kentucky Court of Appeals hopefully will decide that it is time that the policyholder be given a meaningful remedy against the unscrupulous insurer. The insurer would then be forced to deal fairly with its policyholders or suffer the unpleasant consequences.

It must be conceded that, with the adoption of a rule permitting the recovery of consequential damages, damages for mental suffering, or punitive damages against an insurer, there will arise the problem of possible excessive judgments against insurance companies. However, the courts have always retained the power to refuse to enter a judgment that is excessive, and in such a case the plaintiff is often willing to accept a remittitur to a more reasonable sum in order to forestall further litigation. The great need to compensate the insured and to
deter the bad faith conduct of the insurer must not continue to be ignored merely because of the possibility of future excessive judgments.

Sandra M. Varellas