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## Insurers' Liability for Emotional Distress: *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co.*, —Pa. Super. Ct.—, 396 A.2d 780 (1978)

Leland B. Jones

*University of Nebraska College of Law*, [vjones@centurytel.net](mailto:vjones@centurytel.net)

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## Insurers' Liability for Emotional Distress

*D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Co.*, — Pa. Super. Ct. —, 396 A.2d 780 (1978).

### I. INTRODUCTION

In 1970, California introduced a revolutionary concept when the Fourth District Court of Appeals held an insurer liable for intentional infliction of emotional distress for refusal to indemnify its insured under a disability contract.<sup>1</sup> While it was unusual to recognize that tort for a breach of contract, the court went even further by suggesting that "independent of the tort of intentional infliction of emotional distress, such conduct on the part of a disability insurer constitutes a tortious interference with a protected property interest of its insured for which damages may be recovered . . . ."<sup>2</sup> Three years later, the Supreme Court of California adopted this suggestion by holding that a similar complaint stated a cause of action in tort for breach of an insurer's implied duty of good faith and fair dealing.<sup>3</sup>

Recently, the Superior Court of Pennsylvania affirmed a lower court's dismissal of an insured's cause of action which alleged that denial of his insurance claim was "outrageous, malicious and oppressive . . . a willful, wanton and malicious tort . . . ."<sup>4</sup> The per curiam opinion in support of dismissal stated: "We cannot see how a refusal by an insurance company to pay an \$832.23 claim can justifiably give rise to a cause of action for intentional infliction of mental distress or any other cause of action for mental distress."<sup>5</sup>

The dissenting opinion, however, urged that the insured had

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1. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).
  2. *Id.* at 401, 89 Cal. Rptr. at 93-94.
  3. *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).
  4. *D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, — Pa. Super. Ct. —, 396 A.2d 780 (1978). (The order was affirmed because the judges were equally divided).
  5. *Id.* at —, 396 A.2d at 781.

signed his insurance contract "for the peace of mind that if the . . . injury should occur, his claim for . . . damage covered by the policy [would] be treated reasonably by the insurer."<sup>6</sup> The dissent went on to explain: "[T]wo distinct causes of action in tort have been recognized where the insurer refuses payment on a claim by the insured: the first, an action for intentional infliction of emotional distress; and the second, an action for breach of the insurer's duty of good faith dealing."<sup>7</sup>

The following note will analyze *D'Ambrosio* and the evolution of the doctrine of recovery for emotional distress caused by a breach of contract.

## II. FACTS

D'Ambrosio, a police officer, had insured his boat with the defendant, Pennsylvania National Mutual Casualty Insurance Company. The complaint alleged that storm damages in the amount of \$832.23 were covered by the insurance policy and that plaintiff's claim was not paid. Moreover, the defendant refused to explain why the claim was refused and had insinuated that the plaintiff was submitting a fraudulent claim. Plaintiff asserted that as a result he had "suffered severe emotional distress and undue worry about his credit standing and professional reputation as a police officer, and [had] been subjected to repeated demands for payment from the party who repaired the boat."<sup>8</sup>

The insurance company's demurrer to the complaint was sustained by the Court of Common Pleas, Civil Division, of Delaware County. Upon appeal, the equally-divided Superior Court of Pennsylvania affirmed the order.

## III. HISTORY OF THE TORT

The tort of intentional infliction of emotional distress is of relatively recent origin. "Notwithstanding its early recognition in the assault cases, the law has been slow to accept the interest in peace of mind as entitled to *independent* legal protection, even as against intentional invasions."<sup>9</sup> But "the law is clearly in a process of growth, the ultimate limits of which cannot as yet be determined."<sup>10</sup>

The difficulty of proving or measuring damages is offered as a

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6. *Id.* at —, 396 A.2d at 786.

7. *Id.* at —, 396 A.2d at 787.

8. *Id.* at —, 396 A.2d at 782.

9. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 12, at 49 (4th ed 1971) (emphasis added).

10. *Id.* at 50.

reason for the great reluctance to redress mental distress.<sup>11</sup> "But mental suffering is scarcely more difficult of proof, and certainly no harder to estimate in terms of money, than the physical pain of a broken leg, which never has been denied compensation . . . ."<sup>12</sup>

Others objected to the introduction of the tort for fear of a flood of fictitious or trivial claims.<sup>13</sup> Yet,

[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds. . . . [T]he elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of the law.<sup>14</sup>

The early cases required that the emotional distress be accompanied by an established tort, *e.g.*, assault, battery, false imprisonment, or seduction.<sup>15</sup> But eventually emotional distress was recognized as a cause of action in itself, not simply "parasitic" damages.<sup>16</sup>

The earliest appearance of anything like a separate cause of action . . . was in cases holding a common carrier liable for insulting a passenger. . . . [T]he later decisions rest the liability upon the special obligation of the carrier to the public . . . .

The same liability has been imposed upon innkeepers, whose position toward the public is analogous to that of carriers . . . . It has also been extended in a few cases to telegraph companies; and there appears to be little doubt that it would be applied to any other public utility . . . .<sup>17</sup>

In recognition of the public character of the business of apportioning and distributing losses from specified causes, state agencies currently regulate the financial affairs, types of policies, and business methods of insurance companies. Brokers and salesmen are specially licensed in a further effort to protect individual members of the public who have unequal bargaining power and are subject to overreaching in the negotiation of an insurance contract. Is there any reason that liability for emotional distress should not be extended to insurers in view of their recognized position with the public? Like common carriers, innkeepers, telegraph companies, and public utilities, insurance companies must assume the extraordinary responsibility for faithful service to the public.<sup>18</sup>

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11. *Id.*

12. *Id.*

13. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 18.4, at 1031 (1956).

14. W. PROSSER, *supra* note 9, at 50 (footnote omitted).

15. "[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse . . . . The plaintiff cannot recover merely because he had his feelings hurt." *Id.* at 54, 55.

16. *Id.* at 51-52.

17. *Id.* at 52-53.

18. *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1, 5 (7th Cir. 1972).

Neither Prosser<sup>19</sup> nor the *Restatement of Torts*,<sup>20</sup> discusses this tort in connection with the breach of a contract. However, the *Restatement* includes a caveat that "[t]he Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress."<sup>21</sup>

Breach of contract cases have been brought by attempting to fit the claim into the "tort tailored" requirements of the *Restatement*. Some recent attempts have been successful,<sup>22</sup> while others have failed.<sup>23</sup>

#### IV. ACTIONS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In an action for intentional infliction of emotional distress, the plaintiff must allege the following four elements: "(1) *outrageous conduct* by defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering *severe or extreme emotional distress*; and (4) actual and proximate causation of emotional distress by the defendant's outrageous conduct."<sup>24</sup>

In *Fletcher v. Western National Life Insurance Co.*,<sup>25</sup> the insurer was held liable in tort for damages caused by its refusal to indemnify its insured under a disability policy. The insured plaintiff had

19. W. PROSSER, *supra* note 9 at 54-55.

20. RESTATEMENT (SECOND) OF TORTS § 46 (1965):

§ 46. Outrageous Conduct Causing Severe Emotional Distress

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

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress.

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

21. *Id.* at 72.

22. *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); *Meiter v. Cavanaugh*, — Colo. App. v. —, 580 P.2d 399 (1978); *Agis v. Howard Johnson Co.*, — Mass. —, 355 N.E.2d 315 (1976); *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974).

23. *Amsden v. Grinnell Mut. Reinsurance Co.*, 203 N.W.2d 252 (Iowa 1972). See notes 55-61 & accompanying text *infra*.

24. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App.3d 376, 395, 89 Cal. Rptr. 78,88 (1970) (emphasis added).

25. *Id.* at 376, 89 Cal. Rptr. at 78 (1970).

purchased a disability insurance policy providing for payments of \$150 per month should he become totally disabled. The payments were to continue for a maximum period of two years if insured became disabled because of sickness, thirty years if from injury. While he was at work lifting a heavy bale of rubber, he injured his back. Following surgery for a hernia, he returned to work but continued to have trouble with his back until he was placed on disability by his physician and terminated by his employer a few weeks later. Numerous doctors examined and treated him after he filed for workmen's compensation, and they all agreed that he was disabled due to the accidental injury to his back.<sup>26</sup> Despite the fact that virtually all these reports reached the insurance company, it refused to pay its insured under the *injury* provision which set forth a thirty-year liability period,<sup>27</sup> but instead insisted on payment under the *sickness* provision having only a two-year period.<sup>28</sup> The insurer's own investigation had established that plaintiff's disability was a result of an injury.<sup>29</sup> The insurance company originally sought to avoid liability by claiming the insured had made a material misrepresentation in his application for insurance,<sup>30</sup> and later attempted to "force" the insured into a settlement at an amount far less than the potential claim.<sup>31</sup>

In upholding awards for compensatory and punitive damages, the California court stated that while an insurance company is privileged to assert its legal rights even though doing so would cause emotional distress, it must do so "in a permissible way and with a good-faith belief in the existence of the rights asserted. . . . Severe emotional distress means . . . emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it."<sup>32</sup> It "may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry."<sup>33</sup> "[D]uration of the emotional distress is one [factor] to be considered in determining its severity."<sup>34</sup> Moreover, "[i]t is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine

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26. *Id.* at 387, 89 Cal. Rptr. at 83.

27. *Id.* at 388, 89 Cal. Rptr. at 84.

28. *Id.*

29. *Id.* at 387, 89 Cal. Rptr. at 83.

30. *Id.* at 390, 89 Cal. Rptr. at 85.

31. *Id.*, 89 Cal. Rptr. at 85-86.

32. *Id.* at 395, 397, 89 Cal. Rptr. at 89, 90.

33. *Id.*, 89 Cal. Rptr. at 91.

34. *Id.* at 398, 89 Cal. Rptr. at 91.

whether, on the evidence, it has in fact existed.'"<sup>35</sup>

The *Fletcher* court then went on to say that "[a]n insurer owes to its insured an implied-in-law duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of the policy. Violation of that duty sounds in tort notwithstanding that it also constitutes a breach of contract."<sup>36</sup> This duty of good faith imposes upon the insurer the "duty not to withhold . . . payments, maliciously and without probable cause, for the purpose of injuring the insured by depriving him of the benefits of the policy."<sup>37</sup> "To some extent [the special duties] take cognizance of the great disparity in the economic situations and bargaining abilities of the insurer and the insured."<sup>38</sup>

While the court held the insurer liable for intentional infliction of emotional distress, it also introduced the possibility of a separate, second cause of action for breach of the insurer's contractual duty of good faith dealing. The conduct of the insurer was held to constitute "tortious interference with a protected property interest . . . for which damages [could] be recovered to compensate for all detriment proximately resulting therefrom, including economic loss . . . and, in a proper case, punitive damages."<sup>39</sup>

## V. THE NEW TORT FOR BREACH OF CONTRACT

Three years later, the Supreme Court of California in *Gruenberg v. Aetna Insurance Co.*,<sup>40</sup> held that a complaint of an insured sufficiently alleged a breach of the insurers' duty of good faith and fair dealing which they owed the insured, and that damages could be awarded for mental distress without a showing that the plaintiff had suffered severe emotional distress or substantial damages therefrom where the plaintiff had sustained substantial property damage. In *Gruenberg*, three insurers denied payment of fire policies to the insured plaintiff. The plaintiff alleged bad faith and outrageous conduct by the insurers who acted in concert to falsely imply that the plaintiff was guilty of arson, thereby attempting to establish grounds for avoiding payment. The defendants had stated to an arson investigator that Gruenberg had acquired excessive fire insurance, and while criminal charges of arson were pending against the plaintiff, they demanded that the plaintiff submit to certain examinations which were required under the poli-

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35. *Id.* at 397, 89 Cal. Rptr. at 90 (quoting RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965)).

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

37. *Id.*

38. *Id.* at 403-04, 89 Cal. Rptr. at 95.

39. *Id.* at 401-02, 89 Cal. Rptr. at 93-94.

40. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

cies. Additionally, one of their claims adjusters appeared as a witness for the state at the preliminary hearing on the felony complaint. The criminal charges against the plaintiff were dismissed for lack of probable cause, and the plaintiff thereafter initiated a cause of action against the insurance companies stating that "as a 'direct and proximate result of the outrageous conduct and bad faith of the defendants,' plaintiff suffered 'severe economic damage,' 'severe emotional upset and distress,' loss of earnings and various special damages."<sup>41</sup> The Superior Court of Los Angeles County dismissed Gruenberg's complaint.

Upon appeal from the dismissal, the Supreme Court of California held that the complaint of the insured had alleged a breach of the insurers' implied duty of good faith and fair dealing which they owed the insured—a cause of action in tort.<sup>42</sup> The insurers argued that the plaintiff could not recover, as a matter of law, because he had not alleged "conduct which [was] 'extreme' and 'outrageous.'"<sup>43</sup> The court, however, concluded that "since plaintiff . . . alleged substantial damages for loss of property apart from damages for mental distress, the complaint [was] sufficiently pleaded with respect to the latter element of damages."<sup>44</sup> The theory of recovery here was "totally distinct" from that used in *Fletcher* which was "predicated on the tort of intentional infliction of emotional distress alone."<sup>45</sup> Thus the court recognized a new mental distress tort for breach of the insurer's duty of good faith dealing.

Prior to *Gruenberg*, courts outside California had hinted at this theory, but those decisions were based upon the older theory requiring proof of outrageous conduct and extreme emotional distress.<sup>46</sup> For instance, in *Eckenroder v. Life of America Insurance Co.*,<sup>47</sup> the court held that allegations by a wife that Life of America Insurance Company's repeated and outrageous refusal to make payment to her as beneficiary of her husband's life policy which caused her "to suffer 'severe distress and disturbance of [her] mental tranquility,'"<sup>48</sup> sufficiently stated a cause of action. The outrageous conduct alleged was refusal of payment with knowledge by the insurer of the decedent's accidental death and "economic coercion" to force her to "compromise" her claim.<sup>49</sup>

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41. *Id.* at 572, 510 P.2d at 1035, 108 Cal. Rptr. at 483.

42. *Id.* at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

43. *Id.* at 579, 510 P.2d at 1040, 108 Cal. Rptr. at 488.

44. *Id.* at 580, 510 P.2d at 1042, 108 Cal. Rptr. at 490.

45. *Id.*

46. *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972); *Amsden v. Grinnell Mut. Reinsurance Co.*, 203 N.W.2d 252 (Iowa 1972).

47. 470 F.2d 1 (7th Cir. 1970).

48. *Id.* at 2.

49. *Id.*

Decedent left plaintiff with several children, but no property of value. She had no money, none even for the funeral expenses. Denied payment by Insurer, she was required to borrow money to support her family, while her financial condition worsened. The family was required to live with, and accept charity from, relatives.<sup>50</sup>

The court found that the alleged conduct "clearly [rose] to the level of 'outrageous conduct' to a person of 'ordinary sensibilities.'"<sup>51</sup> It recognized that "[t]he very risks insured against presuppose that upon the death of the insured the beneficiary might be in difficult circumstances . . ." <sup>52</sup> And, the court noted that "insurance contracts are subject to the same implied conditions of good faith and fair dealing as are other contracts."<sup>53</sup> "We think it is clear that an action of the type involved here sounds both in contract and in tort."<sup>54</sup>

While the Supreme Court of Iowa also stated that violation of the implied-in-law duty of good faith and fair dealing sounds in tort and breach of contract, it too held, in *Amsden v. Grinnell Mutual Reinsurance Co.*,<sup>55</sup> that outrageous conduct and extreme emotional distress—pre-*Gruenberg* requirements—were among the elements that had to be proven. Here, the directed verdict for defendant insurers was upheld "because [the] plaintiff . . . wholly failed to prove it."<sup>56</sup> Fire had destroyed the contents of plaintiff's enterprise in October, 1969, and "[t]he state fire marshal concluded the fire was the work of an arsonist and undertook an investigation. Plaintiff himself was among those investigated. . . . The fire marshal's investigation cleared plaintiff of any responsibility for the fire in February 1970. The loss was settled and paid July 31, 1970."<sup>57</sup>

Despite the fact that it had taken nine months to make any payment on the claim, the court concluded that "[t]he facts presented in the appeal before us do not even begin to approach outrageous conduct."<sup>58</sup> They excused the delay by saying that it was not improper for the insurance company to wait a reasonable period for an arson investigation of the insured, that much of the delay occurred because neither the insured nor the insurer knew the amount of the loss,<sup>59</sup> and that a sixty-day delay in payment after the insured and insurer agreed on the amount of the loss was not

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50. *Id.*

51. *Id.* at 5.

52. *Id.*

53. *Id.*

54. *Id.* at 5 n.4.

55. 203 N.W.2d 252 (Iowa 1972).

56. *Id.* at 253.

57. *Id.*

58. *Id.* at 255.

59. *Id.*

unreasonable.<sup>60</sup> One may wonder what the result would have been if the court had recognized the tort of mental distress based upon a breach of the insurer's implied duty of good faith and fair dealing as set forth in *Gruenberg*<sup>61</sup> six months later.

Six months after *Gruenberg*, the Supreme Court of Virginia again recognized only the older cause of action, requiring extreme and outrageous conduct causing severe emotional distress. In this tort action, it reinstated a jury verdict for the plaintiff by holding that the trial court erred in its holding that no recovery could be given for emotional distress in the absence of physical damage or other bodily harm.<sup>62</sup> This result should be expected since "[i]n 1948 a section of the Restatement of Torts was amended to reject any absolute necessity for physical results."<sup>63</sup> Still, Virginia has not yet adopted the separate, newer cause of action for mental distress caused by breach of the insurer's duty of good faith dealing recognized in *Fletcher*<sup>64</sup> and *Gruenberg*.<sup>65</sup>

The same issue was decided by the Supreme Court of Massachusetts in *Agis v. Howard Johnson Co.*,<sup>66</sup> a decision which emphasized that the doctrine of recovery for the mental distress caused by a breach of contract was a novel concept. The trial court had dismissed a mental anguish complaint of a former Howard Johnson employee for being summarily fired. The complaint did not allege any resulting bodily injury. Without considering the claim as one for breach of the contract-implied duty of good faith and fair dealing, the appellate court updated the trial court's decision by not requiring that bodily harm be demonstrated. However, it failed to take the second step of recognizing the newer, separate tort, based upon the breach of a contractual duty. The court still insisted upon proof "that the conduct was 'extreme and outrageous,' . . . [and] that the emotional distress sustained by the plaintiff was 'severe.'"<sup>67</sup>

Another approach to the same result (liability of the insurer) was recently taken by the Colorado Court of Appeals in *Meiter v. Cavanaugh*.<sup>68</sup> While refusing to recognize the newer tort, the court held that the determination of whether the defendant's con-

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60. *Id.* at 253.

61. 9 Cal. 3d at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486 (1973).

62. *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974).

63. W. PROSSER, *supra* note 9, at 50.

64. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

65. 9 Cal. 3d at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486 (1973).

66. — Mass. —, 355 N.E.2d 315 (1976).

67. *Id.* at —, 355 N.E.2d at 319 (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

68. — Colo. —, 580 P.2d 399 (1978).

duct was "outrageous" should be for the jury.<sup>69</sup> In *Meiter* the plaintiff had purchased defendant's house so that her grandchildren and recently widowed daughter-in-law could live in it. The defendant refused to surrender possession of the house at the time appointed in the contract, threatened the plaintiff with legal action while implying special influence with the court, and called her a "sick old woman" while she was bandaged following recent cancer surgery.<sup>70</sup> The defendant vacated the premises approximately one and one-half months following the contracted date.<sup>71</sup>

Although the Supreme Court of Iowa determined that nine months to make payment on an insurance contract claim was not outrageous,<sup>72</sup> the Colorado court held that abusive conduct in addition to a month and one-half delay in vacating a purchased residence presented a jury question regarding its outrageousness. "The question of whether certain conduct is sufficiently outrageous is ordinarily a question for the jury."<sup>73</sup>

The antiquity of this area of the law in some jurisdictions was also demonstrated in *Sheltra v. Smith*.<sup>74</sup> The "independent cause of action [of] outrageous conduct causing severe emotional distress . . . has not previously been recognized in Vermont. Vermont jurisprudence has recognized that mental distress caused by negligent acts resulting in *physical injuries* is actionable."<sup>75</sup> In this non-contract, tort action, the Supreme Court of Vermont reversed the trial court's dismissal of plaintiff's complaint, holding that the cause of action could be maintained despite the absence of physical injuries.

While some states remain reluctant to recognize mental distress without physical injuries, California departed from such requirements where there were accompanying property injuries by 1945,<sup>76</sup> and expanded property injury to include pecuniary losses by 1967.<sup>77</sup> In *Thompson v. Simonds*,<sup>78</sup> the court held that it could not say that a \$1000 damage award was excessive for "pain, anxiety, inconvenience, annoyance, interference with the comfort of plaintiff and his family, and disadvantage suffered by reason of a

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69. *Id.* at 401. Presumably, the jury would also decide whether the distress was "severe."

70. *Id.* at 400.

71. *Id.*

72. 203 N.W.2d 252 (Iowa 1972).

73. 580 P.2d at 401.

74. — Vt. —, 392 A.2d 431 (1978).

75. *Id.* at —, 392 A.2d at 432 (emphasis added).

76. *Thompson v. Simonds*, 68 Cal. App. 2d 151, 162, 155 P.2d 870, 876 (1945).

77. *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 434-36, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967).

78. 68 Cal. App. 2d 151, 155 P.2d 870 (1945).

defendant's acts."<sup>79</sup> The evidence showed that the defendant had diverted plaintiff's domestic water supply through a horse trough, had piped water from an iron spring into the plaintiff's line so that it stained the plaintiff's washing and fixtures, and occasionally had totally disrupted the flow of spring water used by the plaintiff to wash his prune crop.

*Crisci v. Security Insurance Co.*,<sup>80</sup> which preceded *Fletcher*<sup>81</sup> by three years, held that conduct producing substantial pecuniary damages, and in turn mental distress, was "tortious conduct resulting in substantial invasions of clearly protected interests."<sup>82</sup> But, the court stated it was not "concerned with the problem whether invasion of the plaintiff's right to be free from emotional disturbance is actionable where there is no injury to person or property rights in addition to the inflicted mental distress."<sup>83</sup> A decision on whether mental distress is actionable without a showing of substantial physical injury or property damage in a tort action against an insurance company for breach of the contract duty of good faith dealing is yet to be made. In the context of breach by refusal to pay a legitimate claim, the question is not applicable since there are pecuniary losses involved.

While *Crisci* concerned the settlement of a third party's claim against the insured, *Fletcher* subsequently introduced the liability for refusal to indemnify the insured's claim. Since *Gruenberg* has refined the new tort in its application to insureds' claims, it would appear to apply as well to mental distress of the insured occasioned by the insurer's bad faith refusal to settle third-party claims.

## VI. CONCLUSION

Mental distress has progressed from reluctant recognition as a "parasite" accompanying previously recognized torts, to an in-

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79. *Id.* at 162, 155 P.2d at 875.

80. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

81. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

82. 66 Cal. 2d at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19. Tenant of the insured sued for \$400,000 when an outside wooden staircase tread gave way, she fell through up to her waist, and was left hanging 15 feet above the ground. The insurer refused to settle for \$9,000 after being advised that the tenant's award would be at least \$100,000 and that psychiatrists were divided as to whether the fall caused her psychosis. The landlord's liability policy was for \$10,000. After the adverse judgment in tenant's action against the insured, the insured became indigent, developed hysteria, suffered a decline in health, and attempted suicide. The Supreme Court of California held that the insured was entitled to recover the difference between the policy limit and the amount of the judgment and \$25,000 for mental suffering.

83. *Id.* at 434 n.4, 426 P.2d at 179, 58 Cal. Rptr. at 19.

dependent cause of action which may itself support another claim.<sup>84</sup> Mental distress has been recognized primarily as a tort, but recently also as a tort based on a breach of contract action.<sup>85</sup> From its recognition as a breach of contract action, a separate cause of action in tort has sprung forth for breach of an insurer's implied duty of good faith dealing.<sup>86</sup>

As the *D'Ambrosio* case demonstrates, despite this progress, some jurisdictions still refuse to allow causes of action for emotional distress caused by breach of contract. Is the denial, for instance, of the sum of \$832.23 so insignificant that it cannot cause emotional distress? Or, is it likely that, given the opportunity, a jury might reasonably decide that denying \$832.23 to a person living on a policeman's salary would be sufficient to cause mental distress? Having purchased insurance against such a loss, did not both the insured and the insurer consider such a loss significant? And, was it not "peace of mind" that prompted the plaintiff to seek insurance? If insurers are selling "peace of mind," why when they breach their contracts should the injured insureds not be compensated?

An original fear of the tort of mental distress was that damages were difficult to assess and prove and therefore a "flood of fictitious and trivial claims might result if an independent tort were recognized."<sup>87</sup> But this is insufficient reason to deny such claims, because as Prosser noted, "[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."<sup>88</sup>

Liability for mental distress has been applied to common carriers, innkeepers, telegraph companies, and public utilities because of their special responsibilities owed the public.<sup>89</sup> Each industry contracts with individuals on its own terms, or its rates are controlled by governmental overseers so that the individual customer has little, if any, bargaining power regarding the terms of the contract. At the same time, each industry is held to a high duty of service to the public because it affects the lives, directly and indirectly, of nearly every person in the wide community served. In-

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84. — Mass. at —, 355 N.E.2d at 320. (Spouse of the distressed plaintiff also entitled to maintain an action for loss of consortium).

85. *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); *Amsden v. Grinnell Mut. Reinsurance Co.*, 203 N.W.2d 252 (Iowa 1973).

86. *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

87. — Vt. at —, 392 A.2d 431, 432 (1978).

88. W. PROSSER, *supra* note 9, at 51.

89. *Id.* at 53.

urers also have a recognized significant public responsibility for similar reasons.<sup>90</sup> Is there any valid reason to exclude insurance companies from liability for mental distress brought on by denying the service rightfully expected?

Of course the insurance companies may validly assert any legitimate defense to a claim they may have. But "when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort."<sup>91</sup> And as the court noted in *D'Ambrosio*:

Thus in *Gruenberg*, the California Supreme Court saw the creation of tort liability for the breach of good faith as a natural outgrowth of a long standing policy that insurers must deal fairly with their insureds; the duty to accept reasonable settlements and the duty to act reasonably in handling claims were merely aspects of the same general duty of good faith and fair dealing.<sup>92</sup>

. . . .  
 . . . This requirement rests in part on the recognition both that insurance contracts are contracts of adhesion, and that the insured at the time of the claim may be in unfortunate circumstances . . . .<sup>93</sup>

. . . .  
 To recover for the intentional infliction of emotional distress the insured must prove that the insurer's conduct was outrageous; but to recover for breach of the insurer's duty of good faith dealing the insured need only prove that the insurer's action was in bad faith.<sup>94</sup>

*Leland B. Jones '80*

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90. *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1, 5 (7th Cir. 1972).

91. 9 Cal. 3d at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

92. — Pa. Super. Ct. at —, 396 A.2d at 784-85.

93. *Id.* at —, 396 A.2d at 785-86 (footnote omitted).

94. *Id.* at —, 396 A.2d at 787.