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THE NEW TORT OF BAD FAITH BREACH OF CONTRACT: CHRISTIAN v. AMERICAN HOME ASSURANCE CORP.

I. INTRODUCTION

In a growing number of jurisdictions today, courts are recognizing a new cause of action affording greater protection to the economic interests and mental security of parties to special contractual relationships.¹ This movement has developed in the context of insurance industry litigation. The cause of action is in tort with a corresponding effect in the law of contracts.² These developments establish the principle that, in contractual relationships, "bad faith conduct" that precipitates or exacerbates a breach of contract, may be regarded as tortious.³ Not only do the holdings of these jurisdictions have substantial consequences for the insurance industry,⁴ but they may also come to affect


contracting parties in other forms of business transactions as well.\(^5\)

As is often the case with new developments in the law, it was a progressive court in a particular state, here California, which cultivated the theory that an insurer may be liable to its insured for non-contractual damages under appropriate circumstances. Although this concept was once limited in application to California,\(^6\) the Oklahoma Supreme Court in *Christian v. American Home Assurance Corp.*,\(^7\) recently joined other jurisdictions\(^8\) which now recognize this new tort. However, while the California courts are credited for its establishment, they have not articulated the precise breach that will give rise to liability. This lack of precision has left confusion among the courts and impeded attempts to fully define the elements of this new tort.

The Oklahoma Supreme Court in *Christian*, combined selected portions from the developmental California cases in this area. In so doing, *Christian* implicitly encompassed the fundamental principles of this new tort concept. This comment will analyze the law and attempt to name and define the requisite elements for the new cause of action hereinafter referred to as the tort of “Bad Faith Breach.”\(^9\)

**The Oklahoma Decision**

Bobby Christian, the plaintiff-insured in the Oklahoma case, obtained a disability insurance policy from the defendant-insurer, American Home Assurance Corporation, through his employment with the Dow Chemical Company. The premium payments were deducted from the insured’s wages and fully paid, when in the scope of his employment, Christian received injuries leaving him totally and permanently disabled. He timely filed proper proof of disability and made demand for the maximum face amount of the policy, $50,000. The insurer did not pay, nor state the reason for withholding payment of the claim. Christian thereafter brought an action in state court alleging the insurer

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5 Cal.2d 654, 328 P.2d 198 (1958) (liability in excess of policy limits). See notes 105-114 infra and accompanying text.

5. See notes 115-120 infra and accompanying text.


8. See note 1, supra.

9. See notes 121-130 infra and accompanying text.
had breached the contract and sought recovery of the maximum policy benefits. Home Assurance ultimately paid the judgment rendered in favor of plaintiff for the maximum disability benefits. During the trial, it became apparent that the insurer "did not have, and had never had, any defense to the insured's claim."\(^{10}\)

The insured then filed a separate action asserting tort liability for the insured's "bad faith refusal to pay his valid claim."\(^{11}\) The insured alleged that the insurer's acts were intentional, committed with "malice and oppression"\(^{12}\) in total disregard of their duty to pay plaintiff's legitimate claim, and that the insurer, in so doing, breached the duty to treat him fairly and act in good faith.\(^{13}\) The insured sought to recover attorney's fees and litigation costs expended in the original action, along with compensatory and punitive damages, including damages for alleged mental suffering and distress. The Oklahoma Supreme Court concluded that plaintiff Christian had stated a cause of action and specifically stated that "this is a distinct tort based upon an implied duty of the insurer to act in good faith and deal fairly with its insured."\(^{14}\)

The Oklahoma Supreme Court had previously held that insurers have a duty to act in good faith and deal fairly with their insured and that breach of this duty may result in the insurer's liability for amounts in excess of the policy limits.\(^{15}\) American Home Assurance, however, argued that this prior holding was limited to insurance contracts which created "agency" relationships where the insurer represents the insured in the settlement of third party claims.\(^{16}\) Further, the defendant relied upon an Oklahoma statute\(^{17}\) that limits recovery for damages caused by a breach of contract to the amount due with interest only.

In rejecting this second argument, the state supreme court disapproved two prior federal district court decisions construing Oklahoma statutes.

10. 48 Okla. B.A.J. at 1714.
11. Id.
12. Id. at 1718.
13. Id. at 1717-1718.
14. Id. at 1714-1715.
17. Okla. Stat. tit. 23, §22 (1971) provides, "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon." Cf. Okla. Stat. tit. 23, §9 (1971) which provides,

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant. (Emphasis added).
law, which limited recovery on an insurance contract to the face value of the policy. Thereby, the Supreme Court of Oklahoma adopted the California principle that an insurance company has an implied duty to deal fairly and act in good faith, and that a violation of this duty gives rise to an action in tort where, in the proper case, punitive damages may be sought.

II. HISTORICAL DEVELOPMENT IN CALIFORNIA

The premier case in California, Comunale v. Traders & General Insurance Co., considered the rights of the insured against their insurer for the insurer’s bad faith conduct. The California Supreme Court held that a covenant of good faith dealing is implied in every contract and, for the first time, expressly applied that principle to insurance policies. In relation to insurance contracts, the covenant provides that neither party will do anything which will injure the right of the other to receive the benefits of the agreement, and that the insurer will take into account the interests of the insured, giving them at least as much consideration as their own interest. In Comunale, this covenant was held to require the insurer to settle a claim against the insured when that was the most reasonable manner of disposing of the claim, even if the express terms of the policy did not impose such a duty. An insurer who violates this covenant does so at its own risk, allowing the insured to be compensated for all detriment that results, including amounts in excess of the policy limits. Though historically treated as a tort cause of action, the wrongful refusal to settle was determined to sound both in contract and tort, thus affording an election in the remedy to be pursued.

California, almost ten years later, reaffirmed this concept in Crisci v. Security Insurance Co. Here, the court appeared to be saying that

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19. 48 Okla. B.A.J. at 1716-17.
20. 50 Cal.2d 654, 328 P.2d 198 (1958) (Plaintiffs were struck by a truck driven by the insured. Insured’s policy with Traders contained liability limits of $10,000 for each person injured and $20,000 for each action. Traders refused to defend or settle when an offer to accept $4,000 was made by the plaintiffs. Traders was obligated to defend any personal injury suit covered by the policy limits. The trial resulted in judgment in favor of the plaintiffs. The California Supreme Court ruled that the insurer could be found liable for an amount in excess of the policy limits. Judgment rendered in favor of the Comunales for $11,250).
21. Id. at —, 328 P.2d at 200. 22. Id. at —, 328 P.2d at 201. 23. Id. 24. Id. at —, 328 P.2d at 203. 25. 66 Cal.2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). (Plaintiff was a tenant in an apart-
"peace of mind" was a contracted property right. Bad faith conduct by
the insurer infringed this property right causing a breach of the insur-
ance contract.26 Invasion of one's peace of mind is clearly tortious in
nature despite the fact that such behavior also involves a breach of con-
tract. The damages recoverable were expanded by permitting relief for
the insured's mental suffering caused by the insurer's bad faith conduct
in refusing to negotiate a proposed settlement of a third party claim. In
other words, the court restricted recovery for mental suffering for
breach of contract to those cases where there is also tortious conduct in
the nature of a substantial invasion of clearly protected property inter-
ests.27

Confusion as to whether the insured's recovery was in contract,
tort, or both, stunted the development of the cause of action after
Crisci. Soon thereafter, Fletcher v. Western Life Insurance Co.28 fol-
lowed, premised on the established tort theory of intentional infliction
of emotional distress, deemed applicable due to the extreme and outra-
geous conduct by the insurance company.29 However, the court took
the initiative to add an alternative theory for the breach of the implied
covenant of fair dealing. It suggested that the breach of the covenant

26. Id. at —, 426 P.2d at 179, 58 Cal. Rptr. at 19.
27. Id. at —, 426 P.2d at 178, 58 Cal. Rptr. at 18.
28. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970) (The insured had a fourth grade education,
was a common laborer, age 41, married 20 years with eight children. He earned approximately
$289 per week working 70 to 80 hours. He purchased a disability policy from Western National
that paid $150 per month for two years for disability due to sickness, or a maximum of 30 years if
due to injury. The plaintiff sustained a back injury in the course of employment and was unable to
work again. Doctors who examined him were virtually in unanimous agreement that he was disabled.
The insurance company undertook a concerted course of action to persuade its insured to
surrender his policy or settle on unfavorable terms. When this appeared to fail, the insurance
company accused him of a misrepresentation in his insurance application for failure to disclose a
congenital back ailment they alleged was the cause of the insured's pain. The company terminated
further disability payments and demanded return of those paid. The insured testified that he and
his family were required to eat macaroni, beans and potatoes; that his utilities were turned off, that
he was required to "gather" money from friends and neighbors to have them turned back on; that
his house payments were delinquent; that his wife had to leave home and work, and as a result he
had to take one of his children out of school to tend to him and one small child. The court ruled
that due to the resulting mental suffering, the action sounded both in tort and contract and punitive
damages were allowed).
29. Id. at —, 89 Cal. Rptr. at 88.
gave rise to a separate action in tort, describing the insurer’s bad faith conduct with the words, “tortious interference with a protected property interest.”

This new tort had a thorough review in the landmark case of Gruenberg v. Aetna Insurance Co. There, the insurer’s duty of good faith was deemed absolute, unconditional, and independent of the performance of the insured’s contractual obligations. The California Supreme Court stepped forward and adopted the alternative rationale in Fletcher, firmly establishing the new tort. Reviewing the historical development of bad faith breach, California has established that an insurance company is under a contractual duty to the insured to act in good faith and deal fairly with him. A cause of action will be recognized for the protection of property interests and the recovery of economic losses which flow from an aggravated breach of that duty.

III. OKLAHOMA ADDS NEW DIMENSIONS

Subtle Conduct

The discussion by the Oklahoma Supreme Court in Christian presents two important distinctions from the California cases. In the California cases, the bad faith conduct of the insurance companies was either more apparent and outrageous or the resulting consequence to the insured was more extreme. In the Oklahoma case, the insurer’s bad faith conduct was substantially more subtle, the wrongful conduct being in the nature of a deviation from standard ethical business practices; a simple refusal to settle promptly.

30. Id. at —, 89 Cal. Rptr. at 93.
31. 9 Cal.3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973) (The insured was a night club owner who had his property covered by three separate fire insurance policies. Following a fire the insured was charged with both arson and defrauding his insurance company. He contended that a law enforcement officer received this allegation from one of his insurance companies, who claimed he had excess insurance on the subject property. While the criminal charge of arson was pending the insurer demanded the insured’s appearance to examine him concerning the fire. The insured’s attorney advised him not to make the appearance until the arson charge was resolved, and the attorney notified the insurance company that the insured would appear subsequent to outcome of the criminal charge. The company accepted this as a breach of the policy and refused to perform its obligation. After the arson charge was dropped, the insured, unable to obtain cooperation from the insurance company, successfully brought action against Aetna for emotional distress, loss of earnings and other consequential damages).
32. Id. at —, 510 P.2d at 1040, 108 Cal. Rptr. at 488.
34. See notes 25-30 supra.
35. Christian v. American Home Assur. Co., 48 OKLA. B.A.J. 1714 (July 12, 1977) was withdrawn from publication by the court five months after it was decided, see 567 P.2d XXIV (Table
In the second action, the one based on the bad faith breach, the defendant demurred on the ground that the prior judgment, for payment of the policy, had been satisfied and released. Thus, reasoned the insurance company, the plaintiff could not have any other claim against them for damages, including attorney fees and litigation costs. However, the problem with the insurer’s argument is that it would never be in the best financial interests of the insurance company to pay a claim if, as a prerequisite to payment, the insured at his own expense, was first required to initiate suit. Certainly, not every insured could afford the time, effort, and expense to litigate the matter. This procedure would obviously favor the interests of the insurance company, especially in instances such as Christian where the defendant had determined beforehand to avoid payment of the claim.36

The California standard as stated in Crisci is that “an insurer must give the interests of the insured at least as much consideration as it gives its own interests.”37 The Oklahoma court may be going further and saying that the insurer, in considering payment of the claim, should give the insured’s interest more weight than its own. Both states’ courts reflect the idea than an insured purchases insurance and not an unjustified court battle when he enters into the insurance contract.38

A Statutory Duty

In 1958, the California Supreme Court in Communale stated that “[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.”39 This is an implied contractual duty that neither party will act in bad faith. The same court in Crisci further expounded “that the implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate

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36. 48 OKLA. B.A.J. at 1714.

37. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 176, 58 Cal. Rptr. 13, 16 (1967). See also Harris v. Standard Accident & Ins. Co., 191 F.Supp. 538, 540 (1961), where the court reiterated, “Thus, the law imposes upon the insurer the obligation of good faith—basically, the duty to consider, in good faith, the insured’s interests as well as its own when making decisions as to settlement.”

38. Fletcher v. Western Nat’l Life Ins. Co., 10 Cal. App. 3d 376, —, 89 Cal. Rptr. 78, 95 (1970), concluded, “Among the considerations in purchasing insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of accidental loss.” (Citing Crisci v. Security Ins. Co., 66 Cal. 2d 425, 434, 426 P.2d 173, 180, 58 Cal. Rptr. 13, 19(1967)).

39. 50 Cal.2d at —, 328 P.2d at 200. (emphasis added).
case although the express terms of the policy do not impose the duty."40

In 1970, the California Court of Appeals, in Fletcher, said, "[A]n insurer owes to its insured an implied-in-law duty of good faith and fair dealing."41 Finally, in 1973, the California Supreme Court relied on Communale and Fletcher, in noting,

The duty violated—that of dealing fairly and in good faith with the other party to a contract of insurance—is a duty imposed by law, not one arising from the terms of the contract itself. In other words, this duty of dealing fairly and in good faith is nonconsensual in origin rather than consensual.42

In quoting this language, the Oklahoma Supreme Court approved the implied-in-law basis of duty.43 However, the court additionally quoted a provision of the Oklahoma Insurance Code44 found to have been violated by the insurance company: "This statutory duty imposed upon insurance companies to pay claims immediately, recognizes that a substantial part of the right purchased by an insured is the right to receive the policy benefits promptly."45 Accordingly, in the Oklahoma opinion, the insurer was found to be in direct violation of a legitimately imposed duty. Thus, in an insurance contract, a unique situation exists; bad faith conduct may be viewed as a breach of the contract’s terms, or in violation of a duty imposed judicially, or legislatively, or both.46

The question logically arises, in the absence of the statutory duty, would an insurance company in the State of Oklahoma be liable in tort for bad faith conduct toward its insured? Based on the opinion of the Oklahoma court, the answer is affirmative.47 The Oklahoma Supreme Court found that the insurance company violated the “implied in law duty” in tort, as well as statutory duty. Although the Oklahoma court

40. 66 Cal.2d at —, 426 P.2d at 176, 58 Cal. Rptr. at 16.
41. 10 Cal. App. 3d at —, 89 Cal. Rptr. at 93.
43. 45 OKLA. B.A.J. at 1717.
44. OKLA. STAT. tit. 36, §4405 A8 (1970) mandates that, in regard to accident and health insurance contracts, policies must contain a provision as follows:
TIME OF PAYMENT OF CLAIMS: Indemnities payable under this policy for any loss other than loss for which this policy provides any periodic payment will be paid immediately upon receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid — (insert period for payment which must not be less frequently than monthly) and any balance remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof.
45. 48 OKLA. B.A.J. at 1716 (emphasis added).
47. See note 14 supra and accompanying text.
adopted the California approach in its holding, its opinion clearly allows the insurer's conduct to be construed as a violation of a statutory duty as well. This duty may be indicative of the strong state interest involved in the insurer-insured relationship.

IV. ELEMENTS OF BAD FAITH BREACH

Discerning the requisite elements of this new tort is difficult. Nevertheless, an examination of the California cases and the recent Oklahoma decision, suggests that to successfully maintain an action for bad faith breach, the plaintiff will need to allege and prove four essential elements: (1) Duty; the existence of a special relationship between an insured and his insurer which gives rise to the responsibility of the insurer to deal in good faith with the insured. (2) Breach of that duty; the invasion of the insured's protected property interest in the contract and in his peace of mind. (3) Bad faith or unreasonable conduct by the insured. (4) Damages proximately caused by the conduct. Each of these elements is discussed in detail below.

Special Relationship

To date, the concept of bad faith breach has only extended to insurance contracts. The rationale for this special protection is the existence of the relationship between the insurance industry and the state (by virtue of the government's extensive regulation thereof), and the relationship between the insurer and its insured.

Research into the evolution of the insurance industry reveals that the government took an early interest in regulating this enterprise because of the public's interest in seeing that the industry treated citizens fairly. As early as 1914, the United States Supreme Court, recognized the "monopolistic character" of insurance companies noting the unequal bargaining power of the parties. The Court stated that since the business of insurance is so "clothed with a public interest" it is rightly subject to stringent governmental regulations. Through the police

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48. For a discussion of possible expansion of the tort to other business relationships, see notes 115-120 infra and accompanying text.
49. See German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914).
50. Id. at 416.
51. Regarding the power of insurance companies, the Court noted that "the applicant for insurance is powerless to oppose [company policy] . . . and that, it is illusory to speak of a liberty of contract." Id. at 416-417.
52. Id. at 415.
power, the state can regulate the insurance industry and the method in which that business is conducted.\(^5^4\) One writer explains that "[t]he business of insurance is ordinarily deemed to be quasi-public in nature, impressed with a public use, so that its regulation, supervision, and control are authorized and required to protect the general public in safeguarding the interests of all concerned."\(^5^5\) The insurer’s duty to the insured is not limited to that which arises in the normal commercial contract; it is a form of trust where large sums of money are deposited with the right to demand and receive services when the agreed contingency occurs.\(^5^6\) Insurance companies possess great power and are therefore charged with great responsibility.\(^5^7\)

The Christian decision quoted from Fletcher to emphasize this aspect of the special relationship:

The insurance business is governmentally regulated to a substantial degree and is affected with a public interest, offering services of a quasi-public nature: "To some extent this special relationship and these special duties take cognizance of the great disparity in the economic situations and bargaining abilities of the insurer and insured."\(^5^8\)

The quasi-public nature of this governmentally regulated business constitutes the first part of the special relationship. It is the state, as a party to the contract, which imposes the duty of good faith dealing. The duty of good faith and fair dealing "attaches over and above the terms of the contract"\(^5^9\) which are supplied by the insurer.

The second aspect of this element is the insured's reliance on the insurer's credibility. "Probably no other business affects the public so intimately as does the insurance business."\(^6^0\) Among the considerations in purchasing insurance is the peace of mind and security that it will provide in the event of loss, physical injury, sickness or death.\(^6^1\) Thus, when an insured faces one of these difficulties, a reasonable insurance

\(^5^4\) German Alliance Ins. Co. v. Lewis, 233 U.S. 389, (1914).
\(^5^5\) Id. at 414.
\(^5^6\) German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 405 (1914).
\(^5^7\) Id. at 414.
\(^6^0\) See Vance, supra note 53, at § 13.
company can reliably assume that the insured is plagued by worry about himself or his family and is susceptible to emotional distress. In some contexts, this opportunity for over-reaching may create a fiduciary relationship between the contracting parties.62

The fiduciary concept has been recognized in limited aspects of the insurer-insured relationship. Pennsylvania courts have recognized that in agreeing to policy terms that provide the right to handle all aspects of claims against the insured, including the right to make a binding settlement, the insurer assumes a fiduciary position towards the insured, with the concomitant obligations to act in good faith and with due care in representing his interests.63 If the insurer is derelict in this duty, as when it negligently investigates the claims or unreasonably refuses an offer of settlement, it may be liable in an amount beyond the policy limits. Similarly, employing an agency theory, the Tenth Circuit has found a fiduciary relationship between the insurer and insured arising from the terms of a policy where the insurer assumes the exclusive power to determine whether an offer of settlement of a claim should be accepted or rejected.64

The California Supreme Court in Gruenberg did not expressly define the insurer-insured relationship as fiduciary. However, they reasoned that the duty of the insurer not to unreasonably withhold payments due under a policy was an extension of the existing duty imposed on the insurer to act in good faith and accept reasonable settlements when suit is brought by a third party claiming against the insured. The court concluded that these are merely two different aspects of the same duty.65 The California and Oklahoma courts have expressed dissatisfaction with the present relationship between the insured and insurer, especially considering the high emotional and economic reliance of the insured. This special relationship arises from the court's recognition that the insured does not contract to obtain a commercial advantage, but rather for financial protection and mental se-

62. Historically, this was especially true as to marine insurance. See generally VANCE, supra note 53, at § 74.


65. 9 Cal.3d at —, 510 P.2d at 1037, 108 Cal. Rptr. at 485.
curity against accidental loss. The first element of the tort of bad faith breach is the existence of this two prong special relationship between the parties to an insurance contract.

**Invasion of a Protected Property Interest**

The second requisite element of bad faith breach is the invasion of a protected property interest. In the context of a bad faith breach, one part of this protected interest is economic, the contractual aspect, and the other is the peace of mind that insurance is designed to promote, the tort aspect. This interest can be created, protected, and defined by terms of the contract, implied by the requirement of fair dealing, and/or expressed by the state in statutory enactments. The fundamental difference between the tort and contract aspects lies in the nature of the interest protected. Tort actions protect the interest of the individual in being free from various types of harm, whereas contract actions protect the interest in having promises performed. In the context of the tort of bad faith breach, both interests are protected.

**Contract Liability**

In contract law, the protected interests are those expressed or implied by the terms of the contract. The *protection* is the contract created by the parties manifesting mutual assent to the terms; the protection being owed only to the specific individuals named. The *property* is expressed in monetary form as the economic payment that is due the insured upon the occurrence of the agreed contingency. The contract is created to protect the *interest* in having promises performed. If one party breaches, damages will be limited to the amount specified in the contract. The rationale for this limitation was enumerated in the venerable case of *Hadley v. Baxendale,* recoverable damages are limited to those reasonably within the contemplation of the parties at the time of contracting. The general rule followed by the courts for contract recovery in insurance cases is that the property interest is the value of the

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68. 1 A. Corbin, *Corbin on Contracts* §9 (1952).
69. *See Prosser supra* note 67, at 613.
70. *Id.*
insurance policy at the time of breach. The apparent logic of the courts being that the property interest is protected by the terms of the contract and therefore was limited to the face value of the contract itself.

Tort Liability

The insured has a right to be dealt with fairly which is protected by the state. One commentator notes that insurance statutes are enacted to protect the insuring public as well as to regulate the insurance business. In Christian, the protected interest was defined by a statute that imposed on insurance companies the obligation to pay claims immediately. This recognized that a substantial right purchased by an insured is to receive the policy benefits promptly. The Court recognized that unwarranted delay creates the precise economic hardship the insured sought to avoid by purchasing the policy.

In Fletcher, the insurer was held liable in tort for refusal to indemnify their insured under a disability policy. Although the action was brought under the tort theory of intentional infliction of emotional distress, the court explained that the insurer's conduct might also be viewed as a violation of the insured's protected "personal interest in emotional tranquility. . . ." Similarly, Crisci reasoned that tort liability should exist where the insurer's conduct is an interference with a legally protected interest. The property interest is the insured's peace of mind and security which was bargained for in obtaining the contract.

The holding in Fletcher also supports this idea: "Among the considerations in purchasing . . . insurance, as insurers are well aware, is the peace of mind and security it will provide . . . . The very risks insured against presuppose that if and when a claim is made, the insured will be disabled and in strait financial circumstances . . . ."

73. 19 Appleman, supra note 55 §10343, at 14.
75. 48 Okla. B.A.J. at 1714.
76. 10 Cal. App. 3d at —, 89 Cal. Rptr. at 94. While there will continue to be certain factual situations which best lend themselves to the independent tort causes of action for fraud, misrepresentation, or intentional infliction of emotional distress, the new tort theory of bad faith breach could surpass, in popularity and utility, the three theories of recovery. Bad faith breach is easier to prove, has increasing precedent, and possibly could have greater jury appeal.
77. 66 Cal.2d at —, 426 P.2d at 179, 58 Cal. Rptr. at 19.
78. Id.
79. 10 Cal. App. 3d at —, 89 Cal. Rptr. at 95.
Tort liability serves to protect these interests. The Oklahoma and California cases held that “the violation of [this] duty sounds in tort notwithstanding that it may also constitute a breach of contract.” The second element of bad faith breach is the invasion of the property interest sought to be protected.

**Bad Faith Conduct**

The third element of the tort of bad faith breach is the bad faith conduct that exacerbates the breach. Such conduct is a wrongful act or omission that adversely affects the plaintiff’s protected interests. It is a flexible standard that provides a remedy for a wrong after a careful review of all the facts and circumstances. No attempt will be made to define bad faith conduct, but the following discussion should be useful in setting the parameters for this element.

There is no uniformity in the decisions as to what constitutes bad faith. In its simplest form, bad faith is the absence of good faith. From *Communale* to *Gruenberg*, the California courts have repeated that there is an implied covenant of good faith and fair dealing in every contract, including insurance policies, that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. This duty extends to all aspects of company control over decisions concerning payment, settlement, or the defense of claims. The insurance company obviously has a self interest in making its decision and is faced with the reconciliation of inevitably conflicting interests. Because the company is in a position of power to adversely affect the insured’s interest, it must necessarily bear a legal responsibility for the “proper exercise of that power.”

Bad faith, or the failure to comply with the duty of good faith, is generally proven by evidence which is largely circumstantial. Plaintiff’s burden of proof is merely to show bad faith by a preponderance of the evidence. In *Christian*, the Oklahoma court said that the obligation of an insurer to its insured, upon presentation of a valid claim, is not limited to the payment of money only. The court held that the

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83. *Id.* at 540.
84. *Id.*
proper conduct of the insurance company is to make prompt payment. Severe or outrageous conduct or consequences need not exist in order to establish bad faith. One writer believes the requirement of good faith is a minimal standard rather than a high ideal.

The Standard Test

The insurer is held to the standard of a professional when defending lawsuits against its insured. The question is, "[D]id the insurer exercise that degree of skill, judgment and consideration for the welfare of the insured which it, as a skilled professional defender of lawsuits having sole charge of the investigation, settlement, and trial of the suit may have been expected to utilize?" If it did not, the court may regard the conduct as a breach of the duty owed the insured.

In Communale, the bad faith conduct was the failure to settle third party claims brought against the insured, thereby exposing the insured to a judgment in excess of the policy limits. The court declined to follow cases that held there was no liability in excess of the policy limits if the insurer believed there to be no coverage and refused to defend or settle the case. The court, disapproving of an insurer who would profit by their own wrongs, warned that an insurer who denies coverage does so at his own risk, even if the insurer's position was not entirely groundless.

A third party claim was also involved in Crisci. There, bad faith was defined as dishonesty, fraud, concealment, or an unwarranted or unreasonable refusal to settle the claim. The liability may exist whenever the insurer refuses to settle in an appropriate case, and whenever an insurer refuses an offered settlement where the most reasonable manner of disposing of the claim is by accepting the offer. In determining whether an insurer has given consideration to the interests of the insured, the test applied in Crisci was whether a prudent insurer without policy limits would have accepted the settlement offer. In using this "prudent insurer" test, the court is measuring bad faith by an objective standard.

86. 48 Okla. B.A.J. at 1716.
88. See 7A Appleman, supra note 55, at §4712.
89. 50 Cal. 2d at —, 328 P.2d at 202.
90. 66 Cal. 2d at —, 426 P.2d 173, 176, 58 Cal. Rptr. 13, 16.
91. Id.
92. Id.
A similar objective test, applied in California, was premised on the idea that since an insurance company is quasi-public in nature, it is held to the standard of service that the public may reasonably expect. In a different case, a subjective standard was applied where recovery required a finding that the insurer had deliberately withheld payment of the policy and forced an arbitration hearing after it knew the claim to be completely valid and that the company had no defense.

The Fletcher decision, as previously mentioned, involved an action based on the tort theory of intentional infliction of emotional distress. The gravamen of this cause of action is the protection of one's peace of mind from extreme and outrageous conduct. The court also discussed the alternative rationale of the breach of the good faith duty. In this regard, Fletcher applied a dual standard: First, the court applied the objective test as to whether a reasonable insurance company would engage in such conduct. Second, the court applied the subjective test as to whether this insurance company knew or reasonably should have known that harm may result. The California Supreme Court applied this same dual standard in Gruenberg. There, conduct toward the insured was classified as malicious and without probable cause. The court based liability on the insurer's unreasonable and bad faith withholding of payment. The significance of the Gruenberg decision is that the result was based solely on bad faith conduct, whereas Fletcher rested on alternative holdings.

Still another test has been used by the courts. A recent California decision on bad faith appears to rely on a balancing test: an insurer is obligated to give the interests of the insured at least as much consideration as it gives its own interests. This case did not involve knowing, malicious or unreasonable conduct by the insurance company. The company, instead, was proceeding under an apparently reasonable belief that the policy was not applicable because of possible workmen's compensation coverage. Although the delay in payment may have had economic motives, the conduct did not involve malice, but rather a business judgment that the policy was not applicable in the circum-

95. 10 Cal. App. 3d at —, 89 Cal. Rptr. at 93-94.
96. 9 Cal. 3d at —, 510 P.2d at 1038, 108 Cal. Rptr. at 486 (1973).
97. Id.
stances. The court weighed the interests and concluded that the insurer breached the covenant of good faith and fair dealing by its failure to make the payments during pendency of the insured’s claim for workmen’s compensation benefits.99 The number of independent theories of recovery and the variety of standards for determining bad faith, may reflect a California trend toward an application of strict liability in cases of insurer breaches with attendant emotional distress.100

In Oklahoma, a subjective standard was applied in Christian. The plaintiff alleged that the insurance company willfully and in bad faith withheld payment of the claim, knowing that the insured was permanently disabled.101 The court accepted this test while noting that an available defense would be an insurer’s reasonable belief that the claim was factually or legally insufficient.102

Any attempt to list all the factors which might constitute bad faith would unnecessarily limit the usefulness of such a flexible concept to the courts. It is a feeling mainly of unjust treatment that the courts use as a mechanism to provide a remedy for an aggrieved plaintiff. Regarding the insurance industry, case law suggests various indicia including:

[T]he strength of the injured claimant’s case on the issues of liability and damages; attempts by the insurer to induce the insured to contribute to a settlement; failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; the insurer’s rejection of advice of its own attorney or agent; failure of the insurer to inform the insured of a compromise offer; the amount of financial risk to which each party is exposed in the event of a refusal to settle; the fault of the insured in inducing the insurer’s rejection of the compromise offer by misleading it as to the facts; and any other factors tending to establish or negate bad faith on the part of the insurer.103

Another helpful guideline is provided by the Model Unfair Claims Practice Act, which enumerates several additional indicia of bad faith.104

99. Id. at —, 521 P.2d at 1108, 113 Cal. Rptr. at 716.
101. 48 OKLA. B.A.J. at 1714.
102. 48 OKLA. B.A.J. at 1716. See also note 35 supra.
104. The Unfair Claims Practices Act has been enacted by Oregon, OR. REV. STAT. § 746.230 (1975); and California, CAL. INS. CODE § 790.03 (West Supp. 1978). Oregon’s version provides:
Damages

The allegation of damages proximately caused by the defendant's conduct is the fourth element of bad faith breach. An insurer's tortious breach of the covenant of good faith and fair dealings may result in an insured's recovery of attorney fees, litigation costs, compensatory and punitive damages, including damages for mental suffering.105 Two of

the more significant of these categories are discussed below.

Mental Suffering

In a judgment establishing tortious interference with the insured’s protected property interest, damages may be recovered to compensate for all the detriment proximately resulting, including emotional distress.\(^{106}\) Damages may be awarded for mental suffering without a showing that the insured suffered severe or aggravated emotional distress, as is necessary in the independent tort of intentional infliction of mental suffering.\(^{107}\) The plaintiff need show only an aggravation of his money or contract damages. In California, an action for mental suffering arises after a showing of an aggravation of damages, as loss of earnings, foreclosure of business, mounting credit liabilities, litigation costs or medical expenses, and the mental anguish which results.\(^{108}\) In reviewing the remedies allowed by the courts, careful attention is necessary in order to distinguish between the recovery for mental distress as a result of bad faith conduct and the independent tort of intentional infliction of emotional distress.\(^{109}\) Either, or both, may be an available action.

Punitive Damages

The California Supreme Court has stated that the insurer’s mere breach of duty is not sufficient to subject it to liability for punitive damages.\(^{110}\) The insurer must exhibit oppressive or malicious conduct or a conscious disregard of the insured’s rights to be found so liable. Malice, however, as well as malicious intent, may be inferred from the circumstances.\(^{111}\)

\(^{106}\) See notes 1-4 & 20-31 supra and accompanying text.


\(^{108}\) Id. at —, 510 P.2d at 1041, 108 Cal. Rptr. at 489.


Likewise, the Oklahoma court in *Christian* endorsed the California approach and stated that "damages may be recovered to compensate for all detriment proximately resulting therefrom, including economic loss as well as emotional distress resulting from the conduct or from the economic losses caused by the conduct, and, in a proper case, punitive damages."\(^{112}\) Florida courts have also warned that insurance companies are vulnerable to punitive damages when they deal with their insureds unethically.\(^{113}\) The cases are evolving and the courts are in apparent agreement that where the suit rests 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 constitutes a breach of contract does not prevent the recovery of punitive damages.\(^ {114}\)

**V. Other Areas "Bad Faith Breach" May Apply**

Once a contract is formed between two parties in a *special relationship*, the requisite premise for the application of the theory of bad faith breach exists. If the party in the position of power exercises bad faith from which damage ensues, the other party has a remedy in this new area of tort liability. Heretofore, the essence of the special relationship has been the strong state interest in the contract involving services of a quasi-public nature.

A logical expansion of this new tort theory would extend it to other businesses which are governmentally regulated to a substantial degree. A review of Oklahoma statutes suggests some additional businesses within this category, including: state banks and savings and loan associations,\(^{115}\) investment companies,\(^ {116}\) credit unions,\(^ {117}\) trust companies,\(^ {118}\) insurance companies, including surety and bond companies,\(^ {119}\) and common carriers.\(^ {120}\) It is obvious that this new tort could have tremendous impact on the whole of contractual relationships.

\(^{112}\) 48 OKLA. B.A.J. at 1715.  
\(^ {120}\) *Okla. Stat.* tit. 13, §§1-201 (1971).
VI. CONCLUSION: WHAT’S IN A NAME?

“It is time to recognize that the courts have created a new tort.”121 This observation by Dean Prosser in 1939, in reference to the tort of intentional infliction of mental suffering, is equally applicable today to the tort of “bad faith breach.” Legal writers have used varying labels when reviewing the development of this new tort. One writer, obviously displeased with the courts’ attempt to afford more protection to insureds, referred to it as the tort of the “Insurer’s Mistaken Judgment.”122 Others, attempting to describe the purpose of the tort, have referred to it as the “New Tort of Outrage,”123 “Gruenberg-ian Tort,”124 “Tort of Bad Faith,”125 “Tortious Breach of Contract,”126 and “Tortious Interference with a Protected Property Interest.”127 This writer favors the term “Bad Faith Breach” as the appropriate label, even while recognizing that Dean Prosser has said that there is no need for a tort to have a name.128 As another writer in the tort field has expressed,

Most torts have names but there is no necessity that they do so. There are a number of tort actions (and the number is increasing) which are recognized by the courts but, lacking a modern Adam before whom these animals can be paraded to be named, the courts and legal writers have not agreed upon a common name for these actions. As with those torts which have been recognized for a much longer time, these more recent tort actions eventually will have common names. In the meanwhile, a rose by any other name . . .129

It is apparent that after a nineteen-year gestation period, from Communale to Christian, a new tort has been born. The tort of bad faith breach is here to stay. As one insurance writer stated, it is in full bloom and forced upon the insurance industry “like a flower in a hot-

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127. PROSSER NOTE 67 supra at 3.
The fate of this new blossom, in name and effect, lies ultimately in the hands of the American courts of law.

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130. Insurers Beware, supra note 125, at 71.