



1968

Refusal to Settle Claim below Policy Limits - Insurer's Excess Liability - Damages for Mental Suffering

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Recommended Citation

Beverly A. Neblett, *Refusal to Settle Claim below Policy Limits - Insurer's Excess Liability - Damages for Mental Suffering*, 22 Sw L.J. 374 (1968)

<https://scholar.smu.edu/smulr/vol22/iss2/12>

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Whitaker the court did not have complete information on the effect of such a determination, and it was probably correct in refusing to reach the substantive issues without that information. Particularly, the testimony in the trial court had not developed fully the complex set of hydrological facts involved. Since the case is one of first impression, the ultimate decision probably will rest largely on policy grounds, and a full understanding of whose water is involved and how much will be used is essential to a wise decision.

Since the case must now go back to the district court for a full trial, one can only speculate on the ultimate outcome. The fact that the dispute arose in the first place, however, suggests some needed changes in oil and gas lease forms. From the standpoint of the oil companies the case suggests that leases should provide for use of techniques unknown when the lease is executed.⁴⁸ In addition, a decision for *Whitaker* would indicate that the lessee's rights in the surface are not so broad as past cases suggest, and all oil companies, not just those seeking to use fresh water for waterflooding, should re-examine their attitudes toward surface uses. In particular, these rights should be considered from the standpoint of how much of the surface estate will be needed by the lessee for his operations.

The same consideration is applicable to the lessor. From his standpoint the case indicates what should already be clear: an oil company lease form should not be signed without giving some thought to the surface rights being surrendered. Though most forms are not *too* one-sided in their terms, the oil companies are concerned with insuring that they have all surface rights they will need, not with protecting the lessor against damage to his retained estate. The mere fact that a form contains some restrictions on the lessee's surface rights should not delude the lessor into thinking that those restrictions necessarily encompass all situations in which his enjoyment of the surface will conflict with the lessee's operations. In water rights provisions especially, the lessor should consider his own needs for water and should insist that the lease restrictions control the quantity of water to be removed as well as the location from which the lessee may remove it.

Rufus S. Scott

Refusal To Settle Claim Below Policy Limits — Insurer's Excess Liability — Damages for Mental Suffering

An elderly widow owned an apartment building with general liability insurance coverage of \$10,000. One of her tenants suffered physical injuries and developed a severe psychosis after a stairway tread gave way causing the tenant to fall through the opening up to her waist. A suit for

⁴⁸ There is a possibility that this need may be even more acute on leases being executed today than it was on older ones. Modern lease forms attempt to make express provision for all surface uses which the lessee knows about. If a case like *Whitaker* should arise in connection with some use not expressly permitted in one of these more modern forms, the court might fall back on the concept of *expressio unius est exclusio alterius*: that all surface uses not expressly granted are excluded by implication.

negligence was brought against the widow. Pursuant to its contractual duty under the policy, the insurance company assumed the defense. Investigation revealed no evidence of prior mental abnormality in the injured tenant, and the company knew that the tenant had psychiatrists who would testify that the accident caused the psychosis. It was agreed by all the psychiatrists that a sudden fear of falling to one's death could cause this mental illness. Nevertheless, the insurer, assuming that the jury would believe its expert testimony and reject that offered by the injured party, was willing to pay only \$3,000 for the physical injuries and refused a settlement offer for the policy limit of \$10,000. An offer to settle at \$9,000 was also refused in spite of insured's willingness to contribute \$2,500. A jury awarded the injured party \$101,000.¹ Insurer paid \$10,000. As a result of settlement of the judgment,² the widow became indigent, suffered a decline in physical health, and attempted suicide. Thereupon, she brought an action against insurer for breach of an implied covenant of good faith in failing to accept a settlement offer within the policy limits. The trial court awarded insured \$91,000 with interest and \$25,000 for insured's mental suffering. *Held, affirmed*: An insurer is liable for the amount in excess of policy limits recovered from its insured and for damages for mental distress if it breaches the duty to consider the interests of insured in rejecting settlement proposals within the policy limits. *Crisci v. Security Insurance Co.*, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

Under the terms of a standard liability insurance policy the insurer must assume exclusive control of the defense of any tort suit against the insured within the subject matter of the policy. Insurer is given the right to negotiate and decide upon settlement with the claimant. Where the claim is for an amount greater than the policy limits, the insurer's exclusive control of litigation and its option to settle render the insured virtually helpless in avoiding the risk of a judgment exceeding the policy limits. Initially where an offer by the injured party to settle had been rejected by the insurer and a judgment over policy limits resulted, the courts were reluctant to construe contractual duties broadly and extend the limited liability of the insurer under the insurance contracts.³ To determine when liability should be imposed, two standards for measuring the conduct of insurer during its control of negotiation and investigation were developed and are now applied, either separately or concurrently, throughout the United States.⁴ Whether the standard of conduct is captioned "due care" or "good faith," liability is generally founded in tort for breach of a duty implied from the insurance contract.⁵

¹ *DiMare v. Crisci*, 58 Cal. 2d 292, 373 P.2d 860, 23 Cal. Rptr. 772 (1962).

² The settlement gave to the injured claimant \$22,000, a forty per cent interest in insured's claim to a particular piece of property, and a partial assignment of insured's cause of action against the insurer.

³ Note, *Insurer's Refusal To Settle—A Proposal for Imposition of Liability Above Policy Limits*, 60 YALE L.J. 1037 (1951).

⁴ For a review of cases formulating each standard, see *Radcliffe v. Franklin Nat'l Ins. Co.*, 208 Ore. 1, 298 P.2d 1002 (1956).

⁵ Comment, *Insurance—Liability of Insurer for Judgment in Excess of Policy Limits*, 48 MICH. L. REV. 95 (1949).

I. CALIFORNIA REASONABLE GOOD FAITH

California courts adopted the standard of good faith in 1957.⁶ The following year the California Supreme Court examined conduct falling short of this standard,⁷ and formulated a "rather curious definition of bad faith"⁸ with an emphasis on reasonableness and language approaching that of negligence. It declared that if there is great risk of recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement within those limits, consideration of the insured's interests requires the insurer to settle the claim. Insurer's unwarranted refusal to accept a settlement offer constitutes a breach of the implied covenant of good faith and fair dealing. The basis for determining whether an insurer should regard a settlement offer as reasonable is the obligation of insurer to give equal consideration to the insured's interest and to its own.⁹ This obligation is expressed by the special issue: Would the insurer have accepted the offer if the policy had no limits?¹⁰

Not only is good faith defined by California courts as the most reasonable conduct, but also the issues and evidence used to measure insurer's conduct demonstrate the obligation of the insurer to accept a reasonable offer. An important requirement of good faith is that intelligent consideration be given to the offer of settlement based on a reasonable investigation.¹¹ Therefore, a finding of bad faith can be based, among other factors, on the strength of the injured claimant's case on the issues of liability and damages or on failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured.¹²

II. TEXAS DUE CARE

Texas adopted the standard of due care in 1920 in *G. A. Stowers Furniture Co. v. American Indemnity Co.*¹³ Due care was defined as "that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business."¹⁴ Because the insurer stands to lose but a part of the claim and has an interest adverse to the interests of insured, the court reasoned that, as agent, the insurer is bound to give the rights of the insured at least as great consideration as he does his own.¹⁵ However, unlike the California doctrine of good faith, this obliga-

⁶ *Brown v. Guarantee Ins. Co.*, 155 Cal. 2d 679, 319 P.2d 69 (2d Dist. 1957).

⁷ *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198, 68 A.L.R.2d 883 (1958).

⁸ Comment, *Excess Liability: Reconsideration of California's Bad Faith Negligence Rule*, 18 STAN. L. REV. 475, 476 (1966).

⁹ See Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954), for a discussion of the conflict of interests resulting from this obligation.

¹⁰ *Martin v. Hartford Accident & Indem. Co.*, 228 Cal. 2d 788, 39 Cal. Rptr. 342 (1st Dist. 1964); *Davy v. Public Nat'l Ins. Co.*, 181 Cal. 2d 387, 5 Cal. Rptr. 488 (4th Dist. 1960).

¹¹ *Davy v. Public Nat'l Ins. Co.*, 181 Cal. 2d 387, 5 Cal. Rptr. 488 (4th Dist. 1960). In this case the refusal of a California insurer to authorize medical examinations at the suggestion of its attorney where the injuries were known to be serious contributed to a finding of bad faith because the issue of damages was not given "contemplative consideration." 5 Cal. Rptr. at 496.

¹² *Brown v. Guarantee Ins. Co.*, 155 Cal. 2d 679, 319 P.2d 69 (2d Dist. 1957).

¹³ 15 S.W.2d 544 (Tex. Comm'n App. 1929).

¹⁴ *Id.* at 548.

¹⁵ The *Stowers* decision is the only Texas case to mention this conflict of interests between insured and insurer.

tion of the insurer under the Texas due care standard has not been a subject of appellate review as an appropriate special issue to be submitted to the jury.¹⁶ Indeed, little elaboration has been made on the substance of the due care standard in subsequent Texas cases.

Factors actually considered by Texas courts to establish negligence are embraced within those used by California courts to establish bad faith. In *Stowers* three factors were mentioned specifically as bearing on the question of the insurer's negligence:¹⁷ (1) the serious nature of the injuries of the party bringing suit and all the facts and circumstances surrounding the injury; (2) insurer's knowledge of the serious nature of the injuries;¹⁸ and (3) established company policy.¹⁹ Negligence may be based solely on the strength of the evidence presented by the injured claimant in the initial suit against insured.²⁰ Insurer's good faith is but a circumstance relevant to the issue of negligence,²¹ and correspondingly, motive may or may not be a factor establishing bad faith.²²

Because of theoretical similarities and the California stress on the obligation to accept a reasonable offer, in substance the California and Texas doctrines of good faith and due care are the same.²³ Likewise, the scope of admissible evidence used in applying either rule is essentially the same.²⁴ However, despite these similarities a comparison of the record of successful suits by the insured in California courts with the longer but less successful record in Texas indicates that the two standards have not had uniform results.²⁵

III. THE MEASURE OF DAMAGES

Divergence as to the extent of damages recoverable in each jurisdiction explains in part the lack of uniform results. Divergence exists because

¹⁶ See *Jones v. Highway Ins. Underwriters*, 253 S.W.2d 1018 (Tex. Civ. App. 1952) *error ref. n.r.e.*, for illustrations of special issues submitted to the jury in a suit against insurer for negligent refusal to settle.

¹⁷ In *Brown v. Guarantee Ins. Co.*, 155 Cal. 2d 679, 319 P.2d 69 (2d Dist. 1957), the court included in a list of factors indicative of bad faith, two of the factual issues mentioned in *Stowers*.

¹⁸ The insured must prove that insurer had such knowledge or that by the exercise of ordinary care insurer could have had such knowledge. Therefore, *Stowers* indicates that negligence would be proved by insurer's failure to exercise ordinary care in its investigation.

¹⁹ The court permitted evidence to be admitted to the effect that it was a rule of the indemnity company never to make a settlement for more than one-half the amount of the policy.

²⁰ *Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc.*, 215 S.W.2d 904 (Tex. Civ. App. 1948) *error ref. n.r.e.*

²¹ *Id.* at 928.

²² *Davy v. Public Nat'l Ins. Co.*, 181 Cal. 2d 387, 5 Cal. Rptr. 488 (4th Dist. 1960).

²³ In each jurisdiction the duty is implied from the express obligations of the agreement. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198, 68 A.L.R.2d 883 (1958); *G. A. Stowers Furniture Co. v. American Indemn. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929). The relationship created thereby is said to be that of agent and principal. *Brown v. Guarantee Ins. Co.*, 155 Cal. 2d 679, 319 P.2d 69 (2d Dist. 1957); *G. A. Stowers Furniture Co. v. American Indemn. Co.*, *supra*. The insurer is bound to give the rights and interests of the insured at least as much consideration as he does his own interests and yet is permitted error of judgment without liability necessarily resulting. *Davy v. Public Nat'l Ins. Co.*, 181 Cal. 2d 387, 5 Cal. Rptr. 488 (4th Dist. 1960); *Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc.*, 215 S.W.2d 904 (Tex. Civ. App. 1948) *error ref. n.r.e.*

²⁴ Compare *Brown v. Guarantee Ins. Co.*, 155 Cal. 2d 679, 319 P.2d 69 (2d Dist. 1957) with *G. A. Stowers Furniture Co. v. American Indemn. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929).

²⁵ Out of eleven appellate cases in California since 1957, insurer lost ten; out of six cases in Texas since 1929, insurer lost three.

California has consistently followed a "judgment" rule of damages²⁶ while the Texas rule is unsettled.²⁷ At one time Texas courts required prepayment of the judgment by insured before recovery would be allowed.²⁸

California Judgment Rule. Prior to 1967 California courts strongly emphasized that the damage sustained by insured was financial. In the first case to determine whether recovery would be allowed for wrongful refusal to settle, the court found that a solvent insured had suffered financial damage when he was forced into bankruptcy by entry of a judgment in excess of policy limits, although no portion of the excess amount had been paid by insured.²⁹ Thereafter, financial damage was said to exist for the sole reason that an excess judgment was entered against insured.³⁰

The measure of insured's financial damage was determined by the character of his cause of action. Insured's action was held to sound both in contract and in tort, but the contract basis was emphasized by the California Supreme Court in *Comunale v. Traders & General Insurance Co.*³¹ In that case the court decided the measure of damages caused by both a breach of insurer's express obligation to defend a suit against its insured and its breach of the implied duty to settle. The court held that because the suit related to financial damage rather than personal injury the tort character of the action would not prevail to the exclusion of the contractual character. Insured would have freedom of election between the two actions. The court decided to treat the suit in *Comunale* as a contract action. Therefore, to determine damages, it relied solely on the statutory measure of damages for breach of contract, e.g., the amount which will compensate the party aggrieved for all loss proximately caused by the breach, or which, in the ordinary course of things, would be likely to result from it.³² On the basis that a wrongful refusal to settle would ordinarily result in a judgment against insured in excess of policy limits, insurer was held liable for the entire judgment against insured. The inference was subsequently drawn that in California the *Comunale* decision established breach of contract as the basis of insured's claim.³³

²⁶ Comment, *The Role of Prepayment in Excess Judgment Actions*, 11 U.C.L.A.L. REV. 382 (1964).

²⁷ As a result of the judgment rule of damages in California, insured may assign his cause of action without payment of the excess judgment. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198, 68 A.L.R.2d 883 (1958). In Texas if prepayment of the judgment by insured is required before recovery is allowed, assignment would not be practical, because the assignee would also be denied recovery. No Texas court has considered the assignability of the insured's action. However, the Fifth Circuit did uphold the transferability of a contingent claim from the insured bankrupt to the trustee in bankruptcy under section 70 of the Federal Bankruptcy Act, where execution of the excess judgment had forced insured into bankruptcy. *Palmer v. Travelers Ins. Co.*, 319 F.2d 296 (5th Cir. 1963).

²⁸ *Universal Auto. Ins. Co. v. Culberson*, 126 Tex. 282, 86 S.W.2d 727 (1935).

²⁹ *Brown v. Guarantee Ins. Co.*, 155 Cal. 2d 679, 319 P.2d 69 (2d Dist. 1957).

³⁰ *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198, 68 A.L.R.2d 883 (1958).

³¹ *Id.*

³² In *Hunt Bros. v. San Lorenzo Co.*, 150 Cal. 51, 87 P. 1093 (1906), the court explained that § 3300 of the California Civil Code had codified the general rule of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854). Under this statute damages for breach of contract are only those which may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach.

³³ *Critz v. Farmers Ins. Group*, 230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (3d Dist. 1963).

Texas Prepayment Rule. Under Texas law insured's action is solely in tort.³⁴ However, the extent of his recovery is not clear. To recover any amount of the excess portion of the judgment, insured must prove financial damage. To recover exemplary damages, insured must prove gross negligence and financial damage.³⁵ The Texas Supreme Court questioned the existence of financial damage and denied recovery to the insured in a case where insured had not paid the judgment and the policy was an indemnity agreement.³⁶ The court based denial of recovery on a distinction it drew between indemnity and liability insurance policies. Under the terms of an indemnity policy insured could not maintain his suit for any portion of judgment until he had paid that amount. However, the distinction between liability and indemnity policies is no longer a useful one because the standard policy today is one of liability.

Whether prepayment would be required at the present time to prove financial damage is a question unanswered by Texas courts. Scrutiny of the prepayment rule reveals that it does not reflect economic realities. If insured is solvent, prepayment forces him to liquidate his assets, thus increasing his loss, and/or to bring successive suits for portions of the excess judgment, as they are paid. If insured is insolvent, a stronger argument for prepayment exists on the basis that his inability to pay makes him suffer no actual loss. However, this reasoning makes a final judgment meaningless, ignoring the effects of that judgment on both personal and business acquisitions in an economy geared to credit. It assumes that an insolvent insured is destined for a life of poverty and will be clever enough to acquire only property which is statutorily exempt from the reach of his judgment creditor. These assumptions are both "economically improbable and morally indefensible."³⁷ Moreover, an insolvent insured would bear the inequity resulting from the running of limitation on his cause of action against insurer. For purposes of limitation in Texas, the tort is complete and the cause of action is mature when the judgment against insured is final.³⁸ If an insolvent insured acquires non-exempt property after the two-year period of limitation has run on his cause of action, levy of execution of the excess judgment by the injured claimant would bring upon insured financial loss with no recourse against insured's wrongdoer. Judge Brown of the Fifth Circuit, after examining the economic realities of the prepayment rule, concluded that the Texas Supreme Court will recognize that the prepayment rule would produce artificial, absurd and very damaging consequences and constitute rank discrimination against the victims of another's wrong.³⁹

³⁴ *G. A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929).

³⁵ *Linkenhogor v. American Fid. & Cas. Co.*, 152 Tex. 534, 260 S.W.2d 884 (1953).

³⁶ *Universal Auto. Ins. Co. v. Culberson*, 126 Tex. 282, 86 S.W.2d 727 (1935).

³⁷ *Seguros Tepeyac, S.A., Compania Mexicana v. Bostrom*, 347 F.2d 167, 187 (5th Cir. 1965).

³⁸ *Linkenhogor v. American Fid. & Cas. Co.*, 152 Tex. 534, 260 S.W.2d 884 (1953).

³⁹ However, the majority opinion held that the earlier Texas case refusing recovery to an insured on an indemnity policy without prepayment prevented recovery of the excess over policy limits if the insured has no assets and is completely unable to satisfy the judgment. The court wanted partial payment to prove injury; yet it recognized, as a weakness in its rationale, that the excess judgment is a "mortgage on insured's future," the insured being a semi-skilled worker in

IV. THE TRIPLE IMPACT OF CRISCI

Under the facts in *Crisci*, the breach of the duty to consider the insured's interests was clear-cut, summarized in two findings which were "all that was required to constitute this breach."⁴⁰ Evidence clearly supported the finding of considerable risk of substantial recovery beyond policy limits. The insurer had acknowledged that the risk was great, since both the lawyer and claims manager had agreed that an award on the mental suffering issue would be at least \$100,000. A second finding that the insurer failed to consider insured's financial interests as much as its own was clearly supported by the "unreasonable" and "blind faith" of insurer that the jury would believe its psychiatrists exclusively. The belief was unreasonable because the insurer knew that the claimant had credible expert testimony and the insurer's agents had stated that without prior evidence of mental defects the jury was likely to believe the fall caused the psychosis.

Impact on California Reasonable Good Faith. One aspect of the decision will have an impact primarily on the substance of the good faith standard of conduct in California. An attempt was made to clarify that doctrine, bringing it even closer to the standard of due care. The court corrected a deviation from the emphasis it had previously placed on the obligation to dispose of the claim in the most reasonable manner by accepting the settlement offer in an appropriate case.⁴¹ This emphasis had caused some confusion over the distinction between negligence and bad faith. Several decisions had explained the difference with statements that bad faith "implies" or "is the equivalent of dishonesty, fraud and concealment."⁴² One court had added that bad faith and negligence are not legally synonymous and that a determination respecting the presence or absence of good faith involves an inquiry into motive, intent, and state of mind.⁴³ The *Crisci* decision rejected this language as being too strong and too restrictive, explaining that the absence of evidence, circumstantial or direct, showing actual dishonesty, fraud, or concealment is not fatal to the cause of action. Such evidence would be relevant in determining whether the insurer has given consideration to the insured's interest, but would not be necessary for recovery. The court repeated that under the good faith doctrine liability is imposed for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith. It affirmed and embellished the test used to translate the standard of good faith into a trial

his early twenties. *Seguros Tepeyac, S.A., Compania Mexicana v. Bostrom*, 347 F.2d 167 (5th Cir. 1965).

⁴⁰ *Crisci v. Security Ins. Co.*, 426 P.2d 173, 178, 58 Cal. Rptr. 13 (1967).

⁴¹ *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198, 68 A.L.R.2d 883 (1958).

⁴² The former phraseology is used in *Davy v. Public Nat'l Ins. Co.*, 181 Cal. 2d 387, 5 Cal. Rptr. 488, 492 (4th Dist. 1960). The latter phraseology is used in *Crisci v. Security Ins. Co.*, 426 P.2d 173, 176, 58 Cal. Rptr. 13 (1967), giving the statement in *Davy* a much stronger meaning.

⁴³ *Davy v. Public Nat'l Ins. Co.*, 181 Cal. 2d 387, 5 Cal. Rptr. 488 (4th Dist. 1960).

issue. The test is whether a "prudent insurer without policy limits would have accepted the settlement offer."⁴⁴

Impact on the Measure of Damages. The second impact of the *Crisci* decision is the award of damages for mental suffering. The award greatly extended the measure of an insurer's liability in California. To affirm the award, the court faced some difficulties caused by its prior reasoning. Previously the court had focused solely on financial damages suffered by insured and had emphasized the contractual nature of the cause of action. More specifically, because of the reliance on the statutory measure of damages for breach of contract, the court first had to disapprove language which might have been interpreted as providing that the action for wrongful refusal to settle sounds solely in contract.⁴⁵

The question remained whether recovery for mental suffering could be permitted under the general rule of damages in tort codified in the California Civil Code, which would include recovery for all loss proximately caused whether the loss could have been anticipated or not.⁴⁶ The court pointed out that, although an award for mental suffering usually accompanied personal injury awards, recovery for mental distress had also been granted in actions for invasions of property rights without personal injuries.⁴⁷ Finding no substantial reason to distinguish the property cases from the facts and injuries of the instant case, it concluded that a plaintiff who as a result of a defendant's tortious conduct loses his property and suffers mental distress may recover not only for the pecuniary loss but also for his mental distress.

Words of caution and limitation follow this rule of recovery.⁴⁸ First of all, plaintiff must have an actionable claim resulting in substantial damages to property rights or to person apart from damages due to mental suffering. Secondly, not every case involving breach of contract would warrant recovery for mental distress. In the instant case breach of contract was coincident with a tort, and the contract was not obtained by the insured for commercial advantage but for protection against the risks of accidental losses and against the mental distress which might follow the losses.⁴⁹ Thirdly, the causal relationship between the refusal to settle and the damages was not questioned by the insurer.

Impact on Strict Liability. The most extraordinary impact of the *Crisci*

⁴⁴ 426 P.2d at 176.

⁴⁵ See text accompanying note 33 *supra*.

⁴⁶ *Crisci v. Security Ins. Co.*, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

⁴⁷ The cases cited in *Crisci* include nuisance, tortious breach of contract to supply water, and an action to quiet title to easement.

⁴⁸ The court did not discuss the probable limitation on recovery for mental suffering in California where common practice is for insured to satisfy the injured party by an assignment in exchange for an agreement not to levy execution. Although the insured in *Crisci* made an assignment, the injured party had previously recovered a portion of the excess \$91,000. An assignment before execution in exchange for a covenant not to levy execution would preclude recovery for mental suffering under most conditions. In addition, the court's stress on substantial damages and loss of property could prevent an insolvent insured from recovering damages for mental distress.

⁴⁹ As an example of a contract directly concerning the comfort, happiness or personal esteem of one of the parties, the court cites a graphic example, *Chelini v. Nieri*, 32 Cal. 2d 480, 196 P.2d 915 (1948) (breach of a contract to preserve the body of the plaintiff's mother).

decision is that it considered, as dictum, the merits of making the insurer strictly liable for the amount of a verdict in excess of the policy limits if an offer to settle within those limits is refused. The basis for imposing strict liability was the contractual origin of the duty to consider the insured's interests. The court pointed out that ordinarily contractual duties are strictly enforced and not subject to a standard of reasonableness. It indicated that certain propositions are beyond dispute: (1) that the interests of insured and insurer are in conflict whenever there is even slight danger of judgment in excess of the policy limits, (2) that settlement is one of the usual methods by which insured receives protection under the policy, and (3) that purchase of a policy permits the reasonable belief by insured that a sum equal to policy limits is available and will be used.

Four arguments supporting imposition of strict liability were discussed. (1) Strict liability "is a simple rule to apply and avoids the burdens of a determination whether a settlement offer within the policy limits was reasonable."⁵⁰ The burden of determination in this case fell upon a trial court sitting without a jury. Criticism of submitting questions of bad faith or negligence to a jury would enforce this argument,⁵¹ as would similar criticism of the standard of due care.⁵² (2) Strict liability would eliminate the danger that an insurer might reject a settlement offer near the policy limits and gamble with the insured's money to further its own interest. As one commentator pointed out in an article cited by the court, a "no settlement program" to discourage nuisance claims and a "selective litigation program" to establish favorable precedents are difficult factors to measure or prove and while protecting insurance as an institution, these policies ignore the interests of the insured.⁵³ (3) The size of the judgment furnishes an inference that the value of the claim is an equivalent amount and that settlement was the most reasonable method of dealing with the claim. For this reason the burden placed on insurers by a rule of strict liability might not be substantially greater than the burden under existing law.⁵⁴ (4) A reason stated consistently by commentators proposing strict liability is the court's argument that "there is more than a small amount of elementary justice in a rule that would require that, in this situation where the insurer's and insured's interests necessarily conflict, the insurer, which may reap the benefits of this determination not to settle, should also suffer the detriments of its decision."⁵⁵

V. CONCLUSION

The *Crisci* decision has important implications beyond its own jurisdic-

⁵⁰ 426 P.2d at 177.

⁵¹ Appelman, *Duty of Liability Insurer to Compromise Litigation*, 26 KY. L.J. 100, 111 (1938); Comment, *supra* note 8, at 481; Comment, *supra* note 5, at 101.

⁵² Comment, *Insurer's Liability for Judgments Exceeding Policy Limits*, 38 TEXAS L. REV. 233, 236 n.18, 238 (1959); Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954).

⁵³ Comment, *supra* note 8, at 483.

⁵⁴ One commentator has stated that strict liability, or requiring the insurer to pay the full amount of any judgment rendered against the insured, would certainly require him to act as a reasonable man in the position of the insured would act in the conduct of his own affairs. Comment, *supra* note 5, at 102.

⁵⁵ 426 P.2d at 177.

tion. Although the court might have disappointed those who wished for a clarification of the features of bad faith distinguishing it from negligence, its discussion of the correct statement of the standard of good faith will afford a pattern of reasoning for a jurisdiction following the standard of due care. Certainly a Texas court would have held Mrs. Crisci's insurer liable for the amount of the judgment above policy limits on the basis of the two findings of fact deemed sufficient by the California court.⁵⁶

The award of damages for mental suffering has the most important and far-reaching impact. The award is the first in any jurisdiction to give such recovery to an insured in a suit for wrongful refusal of a settlement offer.⁵⁷ What is also important and surprising is that in California the courts would need to give *additional* protection to the insured. In that state the insurer is in a "poor tactical position" at trial and has "minimal chances"⁵⁸ on appeal. An insurer should have been sufficiently informed and warned by decisions prior to *Crisci* of the duty to give consideration to an insured's interests in settlement offers and of the consequences of its failure to do so. The conclusion follows that the award of damages for mental suffering had a punitive purpose,⁵⁹ coupled with the threat of a future adoption of strict liability by California courts.

Because Texas courts have shown an early reluctance to face the economic realities of an excess judgment, making recovery of the excess by insured at present uncertain, there might be reluctance to award recovery for mental suffering in a case of ordinary negligence. The general Texas rule in an action to recover for an injury done to property does not recognize mental suffering as an element of actual damages.⁶⁰ Exceptions of long standing to this rule have been made in cases of libel and slander, physical injuries, suits against carriers for wrongful ejection and other suits connected with peculiar personal inconvenience.⁶¹ However, unlike the California analogy to cases involving injury to property, these exceptions permitting recovery for mental suffering as actual damages have emphasized that the injury is the result of a wilful act.⁶² If wilfulness is required, recovery for mental suffering as actual damages would be tantamount to a showing of gross negligence. Moreover, if recovery for mental suffering was considered punitive in purpose, it would be even more likely that Texas courts would require a showing of gross negligence.

Certainly a rule of strict liability would give an additional or an alternative measure of protection to the insured. In Texas insured is afforded little protection because of the possibility that prepayment might be required. Until the question of whether Texas courts will require prepayment of the judgment by insured is answered, it is doubtful that a rule of strict liabil-

⁵⁶ Even assuming Texas would require prepayment, an insured in Mrs. Crisci's position would recover because \$22,000 was paid to insurer.

⁵⁷ Annot., 40 A.L.R.2d 168 (1955).

⁵⁸ Comment, *supra* note 8, at 480.

⁵⁹ The trial court refused to award punitive damages to Mrs. Crisci. Her recovery of \$25,000 for mental suffering was an award of general damages.

⁶⁰ *Hunt v. Weems*, 208 S.W.2d 423 (Tex. Civ. App. 1948) *error dismissed*.

⁶¹ *Williams v. Yoe*, 46 S.W. 659 (Tex. Civ. App. 1898).

⁶² *Michels v. Crouch*, 122 S.W.2d 211 (Tex. Civ. App. 1938).

ity would be considered in this jurisdiction as a threat to make the insurer consider the interests of its insured.

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