AN INDEPENDENT DUTY OF GOOD FAITH AND FAIR DEALING IN INSURANCE CONTRACTS—*GRUENBERG v. AETNA INSURANCE CO.*

California courts have generally encouraged insurers to deal fairly with their customers. If the insurer failed to accept a reasonable settlement offer from an injured third party, and the third party gained a judgment in excess of the policy limits against the insured, the insurer has been held liable for the excess. This has been accomplished by treating the bad faith failure to settle as a breach of an implied covenant of good faith and fair dealing in the insurance policy. An interesting facet of this breach is that it has been held to sound in either tort or contract.[1] However this dual identity has caused courts to confuse the basic facts that must be pleaded to allege the cause of action.[2] This June, the California Supreme Court had the chance to clarify this area of the law in *Gruenberg v. Aetna Insurance Co.*[3] The case presented a unique fact situation to the Supreme Court, because it involved an alleged bad faith failure to settle directly with the insured, rather than with an injured third party. The Supreme Court also faced the defense that the insured failed to fulfill a condition precedent[4] to the insurers' duty to pay. This comment will analyze the logic of the Supreme Court's disposal of this defense and question whether the decision has not further confused elements of tort and contract

1. *See* Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958); *see also* Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

2. *See* Fletcher v. Western National Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970) (dictum); *see also* Richardson v. Employers Liability Assurance Corp., 25 Cal. App. 3d 232, 102 Cal. Rptr. 547 (1972). These cases are discussed *infra.*

3. 9 Cal. 3d 569, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

4. The condition precedent is standard in California fire insurance policies. *See* CAL. INS. CODE § 2071 (West 1972). "The insured, as often as may be reasonably required . . . shall submit to examination under oath by any person named by this company . . . and shall produce for examination all books of account, bills, invoices and other vouchers . . . ."

in litigation over breaches of the implied covenant of good faith and fair dealing.

Mr. Gruenberg brought suit against Aetna Insurance Co., Yosemite Insurance Co., and American Home Assurance Co., the fire insurers of his restaurant in Los Angeles. A claims adjusting company, a law firm and their agents were also joined as defendants. The complaint charged that the defendants, in order to avoid payment of a fire insurance policy, conspired to imply falsely that Gruenberg had burned down the restaurant. Gruenberg's factual allegations of the conspiracy included: a remark made by the claims adjuster to a member of the fire department's arson squad that the restaurant was over insured; a demand by Aetna that Gruenberg submit to an examination under oath pursuant to the cooperation and notice clause in the policy[5] while criminal charges for arson were pending against him; a refusal by Aetna to give the examination after the criminal charges were dropped;[6] and testimony at Gruenberg's preliminary hearing as to the excessive coverage on the restaurant. Gruenberg claimed that these acts constituted a breach of the insurers' implied contractual duty of good faith and fair dealing, and that as a proximate result of the "outrageous" conduct he suffered severe economic damage, severe emotional upset and duress, and loss of earnings.

The defendants demurred, citing *Hickman v. London Assurance Corp.*[7] as authority for their position that the policy became void after Gruenberg refused to comply with the cooperation and notice condition in the policy. The trial court agreed that fulfillment of the condition must be alleged and sustained the demurrer with

5. *Id.*

6. The charges were dropped at the preliminary hearing for lack of probable cause. Gruenberg's attorney then requested Aetna to allow Gruenberg to testify as to the cause of the fire, but Aetna refused. The attorney was probably relying on dictum in Hickman v. London Assurance Corp., 184 Cal. 524, 533-34, 195 P. 45, 49 (1920). That court stated that the insured could restore his right to the proceeds of the policy by offering to submit to the examination after the criminal charges were dropped.

7. 184 Cal. 524, 195 P. 45 (1920). The facts in *Hickman* are similar to those in *Gruenberg*. After Hickman's store burned down his insurers suspected arson. They consequently called Hickman in pursuant to the cooperation and notice clause, *supra* note 3. Hickman refused because of pending criminal charges. The court denied Hickman's cause of action for payment under the policy because he had not fulfilled, nor offered to fulfill, the cooperation and notice condition precedent in the policy.

leave to amend. Since Gruenberg could no longer fulfill the condition, he elected to stand on his complaint and appeal. The court of appeals sustained the demurrer, but on the ground that Gruenberg had in essence alleged the tort of intential infliction of mental distress, and the insurers' conduct was not sufficiently outrageous to support a cause of action in that tort.[8]

The appellate court's decision stemmed from its confusion over the basis of Gruenberg's cause of action. The case would logically be a contract action,[9] and insureds have sued on that theory.[10] But there has been an exception when the insurer took control of the defense of a suit brought by a third party and in bad faith failed to settle or defend properly.[11] In those cases, the insured was deemed to have a cause of action in either tort or contract, thus giving him a better opportunity to recoup the judgment in excess of the policy limits that he often had suffered at the hands of the third party.[12] As recently as 1958,[13] the California Supreme Court returned to contract law where the insurer did not take control of the defense. But it still awarded damages in excess of the policy limits by construing the statute that limited damages for breach of contract with only money due to the amount plus interest, as intended to restore the plaintiff to where he would have been had the insurance company settled with the third party in good faith. In order to return the injured party to his status quo, damages must include recovery of the amount of the policy plus the amount of the excess judgment.

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8. Gruenberg v. Aetna Ins. Co., 103 Cal. Rptr. 887, 891 (1972) (unreported in Cal. App.).

9. *See* CAL. INS. CODE § 22 (West 1972). "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event."

10. *See, e.g.*, Reichart v. General Ins. Co., 68 Cal. 2d 822, 428 P.2d 860, 59 Cal. Rptr. 724 (1967), *vacated on other grounds*, 68 Cal. 2d 822, 442 P.2d 377, 69 Cal. Rptr. 321 (1968) (cause of action lost to trustee in bankruptcy).

11. *See generally* Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 319 P.2d 69 (1957); *see also* Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, 320 P.2d 140 (1958); for a number of non-California cases *see* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1138-39 n.5 (1954).

12. An insurer has contracted to pay money if the insured suffers damages, *see* note 8, *supra*. When the insured sues in contract to recover money wrongfully withheld, he is seemingly limited to recovery of the money due plus interest. *See* CAL. CIV. CODE § 3302 (West 1972). "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."

13. Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 564, 328 P.2d 198 (1958).

In 1967, the California Supreme Court's decision in *Crisci v. Security Insurance Co.*[14] reestablished an independent tort action for an insurer's breach of an implied covenant of good faith and fair dealing. In *Crisci*, the plaintiff in the original suit fell through the steps of Mrs. Crisci's apartment building. When plaintiff offered to settle for Mrs. Crisci's policy limit of $10,000.00, the insurance company refused, gambling that a jury would award less, even though it knew the odds favored a large judgment. Unfortunately for Mrs. Crisci, the jury awarded the plaintiff $100,000.00.[15] Mrs. Crisci then sued Security, claiming that it refused to settle in bad faith. The Supreme Court upheld an award of $91,000.00 (representing the excess of the judgment awarded the third party plaintiff over the $10,000.00 policy limit that the insurer paid), plus $25,000.00 for mental suffering. The justices stated that Mrs. Crisci had a choice between tort and contract in determining liability, and damages for mental distress were available under the tort theory.

After *Crisci* it was clear that the justices were willing to accept a cause of action in tort when the insurer did not act in the best interests of the insured. Yet, despite the court's decision, the attorneys in a succeeding case of *Fletcher v. Western National Life Insurance Co.*[16] did not rely on *Crisci*, but claimed instead that the insurer's bad faith and unfair dealing in refuisng to indemnify the insured under a disability policy constituted the tort of intentional infliction of mental distress. Nevertheless, the court took the initiative and volunteered:

> We further hold that, independent of the tort of intentional infliction of emotional distress, such (bad faith) 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

14. 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

15. The insurance company paid $10,000.00, and a settlement was arranged for the balance giving the plaintiff $22,000.00 and an interest in a claim Mrs. Crisci had to a piece of property. This left Mrs. Crisci, an immigrant widow of 70, with nothing. She began to babysit, and had to rely on her family to pay the rent.

16. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970). It may have been that the attorney felt that *Crisci* did not apply where the bad faith occurred in dealing directly with the insured. More probably he thought that the insurer's conduct was sufficiently outrageous to support the intentional tort. The case is worth reading to see the extent to which an insurer might go in avoiding full payment on a policy.

> recovered to compensate for all detriment proximately resulting therefrom, including economic loss *as well as emotional distress resulting from the conduct* or for the economoc losses caused by the conduct, and, in a proper case, punitive damages.[17]

Unfortunately this statement confused the distinction between the tort of intentional infliction of mental distress and a cause of action in tort for the breach of the implied covenant of good faith and fair dealing as stated in *Crisci*. *Fletcher* would lead one to believe that damages for the tort included mental distress caused directly by the conduct, where *Crisci* merely stated that if the tort has resulted in substantial damages apart from those due to mental distress, the door to fictitious claims would be closed, and damages for mental distress could be recovered.[18] *Fletcher* leads to confusion if it is read to mean that recovery for mental distress caused by an insurer's bad faith now requires pleading of outrageous conduct and severe emotional distress, requirements traditionally necessary in pleading the tort of intentional infliction of mental distress.[19]

The *Fletcher* dictum did cause confusion in *Richardson v. Employers Liability Assurance Corp.*[20] In *Richardson*, the plaintiff alleged that his insurer breached its duty of good faith and fair dealing by refusing to pay under an uninsured motorist clause in the policy. The trial court held Employers liable, and the insurance company appealed claiming that the jury received erroneous instructions as to the awarding of damages for mental distress. The court agreed:

> To support an award for anxiety and emotional distress, there must be evidence of 'severe emotional distress' (*Fletcher*), or as indicated by *Crisci*, there must be evidence of 'substantial damages' therefrom.[21]

The court not only relied on *Fletcher*, but misstated *Crisci* as well. Again, *Crisci* did not require substantial damages *from* the mental distress, just substantial damages apart from the mental distress in

17. 10 Cal. App. 3d at 401-02, 89 Cal. Rptr. at 93-94 (emphasis added).

18. 66 Cal. 2d at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19. The court in *Crisci* felt that after a plaintiff has suffered substantial damages, mental distress will probably occur. Therefore a limitation to substantial damages apart from mental distress before damages for mental distress can be recovered, would limit recovery to honest claims.

19. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 59 (4th ed. 1971). Since the plaintiff has based his claim on intentional infliction of mental distress the court often refers to outrageous conduct. This also serves to confuse the reader.

20. 25 Cal. App. 3d 232, 102 Cal. Rptr. 547 (1972).

21. *Id.* at 241, 102 Cal. Rptr. at 553 (citations omitted). The court in *Gruenberg* specifically overrules this language. 9 Cal. 3d at 580 n.10, 510 P.2d at 1042 n.10, 508 Cal. Rptr. at 490 n.10.

order to close the door to fictitious claims. Thus, the final appellate court before *Gruenberg* to consider a successful claim arising from bad faith dealings directly with the insured, engrafted the prerequisite of severe emotional distress or substantial damages from the emotional distress before damages for mental distress could be recovered.

Consequently, Gruenberg's complaint alleged that Aetna's conduct was outrageous.[22] This understandable tactic after *Fletcher* and *Richardson* probably led the appellate court to believe that Gruenberg was attempting to plead the tort of intentional infliction of mental distress. It would have seemed more reasonable for the court to have acknowledged Gruenberg's cause of action in tort based on the breach of the covenant of good faith and fair dealing, and only attack the prayer for damages caused by mental distress. *Fletcher's* dictum would have sustained that ruling. But apparently the appellate court misconstrued *Crisci*, disagreed with, or ignored the dictum in *Fletcher*, and held that *Gruenberg's* allegations did not plead facts sufficient to constitute the tort of intentional infliction of mental distress. Gruenberg's attorneys believed that they had at least alleged a cause of action based on *Crisci*, however, and appealed to the California Supreme Court.

The Supreme Court Justices placed primary reliance on *Crisci*. The six to one majority opinion did not distinguish that third party situation and ruled that Gruenberg had alleged sufficient facts to establish a cause of action in tort based on Aetna's breach of the implied covenant of good faith and fair dealing in the insurance policy.

The court then resolved whether Gruenberg's inability to allege compliance with the cooperation and notice clause barred the cause of action. It declared that the duty of good faith and fair dealing was independent, and consequently not effected by the nonfulfillment of the express condition precedent:

> We do not think, however, that the controlling issue here is the nature of *plaintiff's* duty, i.e., whether his dependent duty is prece-

22. Gruenberg claimed that he had alleged sufficient facts to constitute a cause of action for a breach of the covenant of good faith and fair dealing. But apparently he did not plead too clearly. The court commented that the complaint was "far from a model pleading." *See* 9 Cal. 3d at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

dent or subsequent; rather, the crucial issue is the nature of defendant's duty . . . .

. . . In other words, the insurer's duty is unconditional and independent of the performance of plaintiff's contractual obligations.[23]

To illustrate, the court cited its opinion in *Jones v. Kelly*[24] where a landlord maliciously cut off the water supply of his tenant:

> The law imposes the obligation that 'every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his rights.' [Citation] This duty is *independent* of the contract and attaches over and above the terms of the contract. . . . A tort may grow out of or make a part of, or be coincident with a contract. The fact that there existed a contract between the plaintiff and the defendant could not immune the latter from the penalty that is ordinarily visited upon tort-feasors.[25]

From this reasoning the court in *Gruenberg* concluded:

> Similarly, in the instant case, the existence of a contractual relationship does not insulate defendant insurers from liability that is ordinarily visited upon tortfeasors for interfering with a *property interest* of the insured in receiving the benefits of the agreement. Therefore, even though the duty allegedly assumed by the defendant insurers arises from an existing contractual relationship, this duty is independent of the performance of plaintiff's contractual obligations.[26]

Justice Sullivan also clarified the *Fletcher-Richardson* confusion over the recovery of damages for mental distress. He pointed out that outrageous conduct need not be pleaded, and that Gruenberg had alleged substantial economic losses apart from mental distress.[27] Damages for mental distress had, therefore, been sufficiently pleaded.

The court correctly extended the cause of action in tort for a breach of the implied covenant of good faith and fair dealing to first party insurance contract suits. If an insurance company wrongfully refuses to settle directly with its insured, economc losses often will follow before the insured can bring the insurer into court. Gruenberg, for example, was forced to go out of business, and as a result his creditors brought suits to recover money past due. The consequences are often more severe. Less solvent insureds have been forced into bankruptcy, with the sole issue be-

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23. 9 Cal. 3d at 578, 510 P.2d at 1039-40, 108 Cal. Rptr. at 487-88.
24. 208 Cal. 251, 280 P. 942 (1929).
25. 9 Cal. 3d at 578, 510 P.2d at 1040, 108 Cal. Rptr. at 488.
26. *Id.* at 578, 510 P.2d at 1040, 108 Cal. Rptr. at 488 (emphasis added). Gruenberg has a property interest in the amount he alleges to be due under the policy.
27. *Id.* at 580, 510 P.2d at 1041, 108 Cal. Rptr. at 489.

coming whether the cause of action against the insurer passes to the trustee.[28] These consequences are surely as severe as a judgment in favor of a third party that exceeds the policy limits. Equal tort sanction therefore is warranted as sustained by the court in *Gruenberg*.[29]

The court's reasoning was not as sound, however, in ruling that the duty to deal fairly and in good faith with the insured was as independent as the duty not to cut off water in *Jones v. Kelly*. The independence of the covenant in *Gruenberg* cannot be so explained.

The duty not to cut off another's water can be implied from contract. A landlord promising to supply water and then cutting it off would be an example. However the duty not to cut off another's water also exists independently of the contract. By common tort law and modern statute everyone is bound without contract to abstain from injuring the person or property of another, or from infringing upon any of his rights.[30] Consequently the tenant need not point to the contract to hold his landlord liable in tort. It is in this aspect that the landlord's duty is independent of the contract. If the landlord's duty arose solely from contract, as in the case of a covenant to maintain the property, the tenant could only use the contract as the basis for holding the landlord liable after a breach of that duty. The landlord could then raise the tenant's prior material breach or nonfulfillment of a condition precedent to the landlord's duty to perform in defense against the tenant's cause of action.[31]

The court in *Gruenberg* expressly stated that Aetna's duty existed only as long as the contract was in effect and not rescinded.[32] It further buttressed this opinion by relieving the agents of the insurance companies from liability because they were not parties to the contract:

28. This was the issue in Reichart v. General Ins. Co., — Cal. 2d —, 428 P.2d 860, 59 Cal. Rptr. 724 (1967), and Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 319 P.2d 69 (1957).

29. If the sole issue were the extension of tort liability to single party insurance contracts, the court's vote would have been 7-0. The dissent felt that Gruenberg simply did not state facts that could possibly be construed to be bad faith dealing.

30. *See, e.g.*, CAL. CIV. CODE § 1708 (West 1973).

31. *See generally* L. SIMPSON, CONTRACTS § 144 (2d ed. 1965).

32. 9 Cal. 3d at 578, 510 P.2d at 1040, 108 Cal. Rptr. at 488.

> Obviously, the non-insurer defendants were not parties to the agreements for insurance; therefore, they are not, as such, subject to an implied duty of good faith and fair dealing.[33]

Thus when Justice Sullivan used *Jones v. Kelly* to show that the existence of the contract did not immunize Aetna from the penalty that tortfeasors ordinarily face, he missed the fact that Aetna does not ordinarily have the duty, but accepts it by contract, whereas the landlord has the duty not to cut off water regardless of the contract.

The *Gruenberg* justices probably did not look to *Jones v. Kelly* as the basis for their decision. Rather, they were seeking justification for holding the covenant to be independent. They simply felt that an insurer should not be able to escape tort liability by pointing to the insured's failure to abide by the contract, because tort actions are not subject to the fulfillment of conditions precedent.

This reasoning seems just, as long as the plaintiff erred innocently, or faced a seemingly inescapable dilemma as did Greunberg. But the decision to hold the covenant independent also gives a reprieve to less noble plaintiffs who are themselves dishonest. A dishonest insured may now allege that an insurer dealt unfairly and in bad faith in order to interfere with the insured's property interest (payment), when his own failure to fulfill conditions has already terminated the insurance company's duty to pay. To put it another way, the court views the tort to be Aetna's interference with Gruenberg's property interest. Yet that property interest, being contingent on cooperation with Aetna, has not yet vested in Gruenberg. Thus, the decision appears to allow a plaintiff to allege tortious interference with a property interest which is nonexistent at the alleged time of interference.

The same considerations are relevant with regard to the pleading of damages for mental distress. The court emphasized that Gruenberg's cause of action was not the independent tort of intentional infliction of mental distress, which meant that he need not plead outrageous conduct or severe emotional distress. The court stated:

> . . . [Gruenberg] alleged that he suffered substantial economic losses apart from mental distress. He alleged that he suffered loss of earnings; that he was compelled to go out of business and that as a result he was unable to pay his business creditors. . . . We conclude, therefore, that since plaintiff has alleged substantial damages for loss of property apart from damages for mental dis-

33. *Id.* at 576, 510 P.2d at 1039, 108 Cal. Rptr. at 487.

> tress, the complaint is sufficiently pleaded with respect to the latter element of damages.[34]

If we assume these losses were proximately caused by Aetna's interference with Gruenberg's property right in the proceeds of the policy, we must again question the status of Aetna's duty to pay. If Aetna's duty had been relieved by Gruenberg's refusal to abide by the cooperation and notice clause, then there were not property rights with which Aetna could have interfered. The court, however, allowed mental distress to be pleaded as a by-product of the "substantial damages" caused by the assumed interference. This reasoning would serve to uphold a groundless claim for damages for mental distress by calling it a claim for "loss of property".

Moreover, the court's decision that the implied covenant was independent may be construed to mean more than the justices intended. The court stated that plaintiff need not allege fulfillment of the express conditions in order to bring an action in tort. But by expressing the ruling in such broad contract terminology, the majority's opinion could lead one to conclude that a contract action for a breach of the implied independent covenant of good faith and fair dealing does lie without alleging the fulfillment of conditions precedent to the insurers' obligation to pay. It would require close analysis of the entire opinion to read "The duty of good faith and fair dealing is independent"[35] as limited only to tort actions. Yet the court was only trying to explain that Gruenberg's failure to fulfill the cooperation and notice condition did not effect his cause of action because he was able to sue in tort.

It would not overburden plaintiffs in this area to have held that a tort action arising solely from a breach of an implied covenant would exist only in favor of a plaintiff who would otherwise have the right to receive payment under the contract. Consequently, the Court could have simply ruled that the fulfillment of the express condition was excused by the insurer's interference. The *Gruenberg* justices even stated that Aetna's conduct would have excused the condition if the covenant of good faith and fair dealing were dependent.[36] This solution would require the plaintiff to allege interference with a vested property interest (all conditions

34. *Id.* at 580, 510 P.2d at 1041-42, 108 Cal. Rptr. at 489-90.
35. *Id.* at 578, 510 P.2d at 1039-40, 508 Cal. Rptr. at 487-88.
36. *Id.* at 578 n.9, 510 P.2d at 1040 n.9, 108 Cal. Rptr. at 488 n.9.

precedent to the defendants' obligation either having been fulfilled or excused), in order to maintain an action in tort.

Since this limit is lacking in *Gruenberg*, and the decision reads as making the covenant of good faith and fair dealing independent, plaintiffs in other areas of contract law may seek to extend the decision beyond insurance litigation. All have the covenant to work with since there is an implied covenant of good faith and fair dealing in every contract.[37] However, the *Gruenberg* court may have intended to limit its decision to insurance contracts:

> In other words, the insurer's duty is unconditional and independent of the performance of plaintiff's contractual obligations.[38]

Yet in spite of that language the court uses the landlord-tenant case *Jones v. Kelly* to "clarify" its reasoning and concludes *Gruenberg* very generally:

> [T]he non-performance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded.[39]

It is worth noting that California dictated the basic terms of the fire insurance policy between Aetna and Gruenberg.[40] This would presumably indicate that the terms of the policy were fair to both parties. The court's ruling then, cannot be explained in terms of making the parties equal, although the decision would find even greater justification if Aetna had dictated a policy containing numerous conditions that were difficult to fulfill. In that situation the conditions themselves could be viewed as a bad faith attempt to block a suit by the insured, which would further encourage the court not to take them into account. It may be, therefore, a one-sided employment contract or sales agreement that first brings a court to accept a plea that the reasoning in *Gruenberg* should be extended to all contracts.

Still, however, there is no certainty that *Gruenberg* will be carried so far. The more immediate effect of the decision will probably be in the field of insurance litigation. One would hope that the court's acceptance of the tort in single party suits would stimulate quick settlements out of court, especially since no-fault insurance will bring a rash of first-party disputes over how much dam-

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37. *See* 12 CAL. JUR. 2d *Contracts* § 133 n.19 (1969).

38. 9 Cal. 3d at 578, 510 P.2d at 1040, 108 Cal. Rptr. at 488 (emphasis added).

39. *Id.*

40. *See* CAL. INS. CODE § 2070 (West 1972). "All fire policies on subject matter in California shall be on the standard form . . . ."

age the insured has suffered.[41] Of course the bad faith insured, whom the decision actually favors because it ignores his behavior under the contract, may purposely reject settlement and try for a large judgment from a generous jury. But it is submitted that this situation would be rare. Proponents of no-fault insurance offer the most optimistic prediction. They feel that the relations between the insured and his insurer are relatively smooth, thus indicating the "Greunberg-ian" tort may be rare.[42]

In the final analysis the true effect of *Gruenberg* cannot be predicted until the Supreme Court of California decides what type of conduct constitutes a breach of the implied covenant of good faith and fair dealing. The *Crisci* standard, whether a prudent insurer without policy limits would have accepted the settlement offer, obviously cannot apply to single party litigation because no third party is involved. *Gruenberg* did nothing more than overrule Aetna's demurrer. It did not decide that the insurers' conduct breached their duty of good faith and fair dealing.

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41. *See* Comment, *Critique of Basic Protection for the Traffic Victim—The Keeton-O'Connel Proposal*, 540-41 INS. L.J. 73 (1968).

42. "Another lubricating feature of the no-fault system is that one deals with one's insurance co. [*sic*] instead of a hostile stranger." J. O'CONNEL, THE INJURY INDUSTRY 95 (1971).