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Tortious Liability for Bad Faith Refusal to Pay

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INSURANCE LAW

TORTIOUS LIABILITY FOR BAD FAITH REFUSAL TO PAY

IN *HOSKINS V. AETNA LIFE INS. CO.,*[1] the Ohio Supreme Court imposed on insurers a good faith duty in any refusal to pay claims made by their insured. Its decision placed Ohio among a growing number of jurisdictions that have recognized this good faith duty.[2] The court adopted its rationale by relying heavily on existing insurance case law in the refusal-to-settle third-party claims type actions.[3] The court defined the standard of good faith in terms of a reasonable justification by the insurer in refusing to pay a claim "because it believed there was no coverage of the claim."[4] The court distinguished between conduct which is tortious and that which is malicious, and it is the latter that must be shown before punitive damages may be assessed.[5] Under the court's criteria for malicious conduct, the insurer must exhibit affirmative action in the performance of his contractual obligations that was an intentional wrongdoing specifically meant to harm the insured.[6] The court relied on this distinction finding that the plaintiff had failed to show actual malice justifying punitive damages.[7] However, it was not expressly stated in the court's opinion whether a breach of good faith which is not malicious will permit the plaintiff any additional remedy beyond the expectations of the contract.

On June 1, 1977, Carl R. Hoskins retired from state employment. As a member of Public Employment Retirement Board of Ohio (PERB), Hoskins and his wife were covered by a group hospitalization and medical policy provided by defendant, Aetna Life Insurance Co. In October 1977, Mrs. Hoskins suffered the third in a series of serious strokes and was admitted to the surgical medical unit of Hocking Valley Community Hospital. At this point, it was undisputed that the plaintiff was covered under the surgical medical policy that provided $250,000.00 coverage. The plaintiff's physician, Dr. Bontrager, decided on January 2, 1978 to move Mrs. Hoskins from the surgical medical unit to

[1]6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983).

[2]Old Southern Life Ins. Co. v. Woodall, 326 So.2d 726 (Ala. 1976); United Services Auto. Ass'n v. Werley, 526 P.2d 28 (Alaska 1974); John Hancock Mut. Life Ins. Co. v. McNeill, 27 Ariz. App. 502, 556 P.2d 803 (1976); Norfolk & Dedham Mut. Fire Ins. Co. v. Cumbaa, 128 Ga. App. 196, 196 S.E.2d 167 (1973); Matthews v. Travelers Ins. Co., 212 Kan. 292, 510 P.2d. 1315 (1973); Citizens Discount & Investment Corp. v. Dixon, 499 S.W.2d 231 (Mo. App. 1973); United States Fidelity & Guaranty Co. v. Peterson, 91 Nev. 617, 540 P.2d 1070 (1975); State Farm Gen. Ins. Co. v. Clifton, 86 N.M. 757, 527 P.2d 798 (1974); Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976); Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1978).

[3]Hoskins v. Aetna Life Ins. Co., 6 Ohio St. 3d 272, 275-76, 452 N.E.2d 1315, 1319-20 (1983).

[4]*Id.* at 277, 452 N.E.2d at 1321.

[5]*Id.* at 279, 452 N.E.2d at 1322.

[6]*Id.* at 277, 452 N.E.2d at 1321.

[7]*Id.* at 279, 452 N.E.2d at 1322.

the convalescent area of the hospital to allow for the use of the therapeutic tilt table. Dr. Bontrager testified at the trial that this move was intended for the hospital's convenience. It was at this time, that the defendant's representative unilaterally determined that this move constituted a change in coverage according to the policy terms.[8] Thereby coverage was transferred to the convalescent policy where benefits ran for 365 days exclusive. In March 1979, Mr. Hoskins was notified that his bills had not been paid for January and February 1979. The plaintiff and his attorney, as well as Dr. Bontrager, all contacted the defendant in an attempt to explain that the change was for convenience and not due to a change in the condition of Mrs. Hoskins. In response to these challenges, defendant on April 2, 1979, called the hospital to verify that the hospital did have a convalescent facility and that Mrs. Hoskins was in that area. In November 1979, plaintiff filed suit claiming breach of contract and tortious wrongdoing due to defendant's breach of duties. Plaintiff asked for both compensatory and punitive damages. The trial court ruled that the complaint did not properly allege a cause of action in tort justifying punitive damages.

Relying on recent Ohio lower court decisions, the court of appeals stated that where a valid claim is breached by an insurance company and that breach amounts to a willful, wanton independent tort, punitive damages could be assessed.[9] The court found the record indicated that there was enough evidence to allow the issue of punitive damages to go to the jury. The facts that the court found essential were: the defendant's failure to notify the plaintiffs of changes in policy for fourteen months; the unilateral decision based on policy wording; failure to investigate once notified of the conflict; and Aetna's knowledge of plaintiff's difficult economic position.

In a case of first impression, the Ohio Supreme Court determined that a cause of action did exist in tort arising out of an insurance contract against

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[8]Specifically these clauses provide as follows:

> The term "hospital" means only an institution which meets fully every one of the following tests namely, (a) it is primarily engaged in providing-for compensation from its patients and on an inpatient basis-diagnostic and therapeutic facilities for the surgical and medical diagnosis, treatment, and care of injured and sick persons by or under the supervision of a staff of physicians, and (b) it continuously provides twenty-four hour a day nursing service by registered graduate nurses, and (c) it is not, other than incidentally, a place for rest, a place for the aged, a place for drug addicts, a place for alcholics, or a nursing home, or a place for custodial care. The term "convalescent facility" means only an institution (or a distinct part thereof) which meets fully every one of the following requirements: (1) it is primarily engaged in and duly licensed to provide, for compensation from its patients and on an inpatient basis, skilled nursing and physical restoration services for patients convalescing from an injury or disease. (2) it is under the full-time supervision of a physician or registered professional nurse. (3) it provides skilled nursing services on a twenty-four hour basis under the direction of a full time registered professional nurse, with licensed nursing personnel on duty at all times. (4) it maintains a complete medical record on each patient, and (5) it has in effect, for all its patients, a Utilization Review Committee which would satisfy the requirements for recognition under Medicare Title XVIII.

Id. at 273, 452 N.E.2d at 1317.

[9]Hoskins v. Aetna Life Ins. Co., No. 353, slip op at 5-6 (Hocking County Ct. App. Jan. 21, 1982). *See,* Kirk v. Safeco Ins. Co., 28 Ohio Misc. 44, 273 N.E.2d 919 (1970). App cite for Ct. of App.

the insurer for a bad faith failure to pay a claim of its insured.[10] The court based its holding primarily on an analogy to established case law in Ohio involving bad faith refusal-to-settle in the context of liability insurance contracts.[11] In these cases, the court had imposed a duty of good faith on an insurance company which had reserved the exclusive right to settle or litigate for the insured under a liability policy.[12] The standard of good faith could not be breached by negligence but needed to be accompanied by a refusal that amounted to fraud or bad faith.[13] In *Slater v. Motorists Mutual Insurance Co.*, the Ohio Supreme Court held that to support a recovery the plaintiff must prove that "[the] insurer's behavior was of such a reprehensible and tolerable nature as to constitute bad faith."[14] The policy argument for this imposition of liability beyond the intent contemplated in the contract is analogous to the rationale offered in unconscionable recissions in contract actions.[15] Other jurisdictions imposing a similar good faith duty in liability settlements have recognized alternative rationales for this policy decision,[16] such as the insured having a property interest in the contract or that a conflict of interest exists between insured or insurer.[17]

The court extended this duty of good faith to claims made by an insured to his own insurance company.[18] The court relied on decisions outside of Ohio which held that the duty applies to the insurance company whether it is dealing with its insured or a third party.[19]

The court addressed the liability that would exist under this extension of good faith in the failure or refusal to pay a valid claim by the insurance company. The court used the term "liability" in two contexts. The first is the extent of the financial liability for a breach of contract that involves a breach of good faith. In a normal breach of contract, damages are limited to the amount

[10]Hoskins v. Aetna Life Ins. Co., 6 Ohio St. 3d 272, 277, 452 N.E.2d 1315, 1320 (1983).

[11]*Id.* at 275, 452, N.E.2d at 1320.

[12]*See,* Hart v. Republic Mut. Ins. Co., 152 Ohio St. 185, 87 N.E.2d 347 (1949), Slater v. Motorists Mut. Ins. Co., 174 Ohio St. 148, 187 N.E.2d 45 (1962), Centennial Ins. Co. v. Liberty Mut. Ins. Co. 62 Ohio St. 2d 221, 404 N.E.2d 759 (1980).

[13]*See,* Hart v. Republic Mut. Ins. Co., 152 Ohio St. 185, 87 N.E.2d 347 (1949).

[14]Slater v. Motorists Mut. Ins. Co., 174 Ohio St. at 151, 187 N.E.2d at 48 (1962).

[15]Hoskins v. Aetna Life Ins. Co., 6 Ohio St. 3d 272, 275, 452 N.E.2d 1315, 1319 (1983). The factors considered of importance by the court were as follows: 1) Insured has no real voice in preparation of the contract, 2) Great disparity of economic positions, 3) Settlement occurs at the time when the insured is already facing great financial and emotional hardship. *Accord* Motorists Mut. Ins. Co. v. Trainor, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973), Battista v. Lebanon Trotting Ass'n, 538 F.2d 111 (6th Cir. 1976).

[16]Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970), Escambia Treating Co. v. Aetna Casualty and Sur. Co., 421 F. Supp. 1367 (N.D. Fla. 1976).

[17]*See* Santilli v. State Farm Life Ins. Co., 278 Ore. 53, 562 P.2d 965 (1977), Findley v. Time Ins. Co., 264 Ark. 647, 573 S.W.2d 908 (1978).

[18]Hoskins v. Aetna Life Ins. Co., 6 Ohio St. 3d 272, 276, 452 N.E.2d 1315, 1319-20 (1983).

[19]*Id.* at 276, 452 N.E.2d at 1319; Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

due under the contract plus interest.[20] In the refusal-to-settle cases, the courts have also allowed damages that match the excess of the policy where there has been a breach of good faith that caused the excessive liability.[21] This demonstrates that the courts may impose damages beyond the expectation of the contract. However, the mere nonperformance of contractual obligations will not be enough to assess liability beyond contract expectations.[22] Nor will liability be imposed for negligence or bad judgment in the performance of contractual duties.[23] Liability will be imposed only where there is evidence of a dishonest intent to deceive another that is, or borders, on fraud.[24] The plaintiff has the burden of showing that the insurance company did not have any reasonable justification in refusing to pay and that the insurer's belief was arbitrary and capricious.[25]

In making the transition to the second major concern in this case, the court stated that if there is a tortious wrong-doing, then punitive damages may be considered.[26] The standard for punitive damages is set out in *Columbus Finance v. Howard:* "[T]hat state of mind under which a person's conduct is characterized by hatred or ill will, a spirit of revenge, retaliation, or a determination to vent his feelings upon other persons . . . . actual malice may be inferred from conduct and surrounding circumstances . . . ."[27]

There is a distinction between conduct which gives rise to tort liability and that imposed for punitive damages.[28] The difference may be found in the level of culpability that constitutes bad faith. As set forth in a California decision, *Silberg v. California Life Insurance Co.:*

> It does not follow that because plaintiff is entitled to compensatory damages that he is also entitled to exemplary damages. In order to justify an award of exemplary damages, the defendant must be guilty of oppression, fraud, or malice . . . . While we have concluded that defendant violated its duty of good faith and fair dealing, this alone does not necessarily establish that defendant acted with the requisite intent to injure plaintiff.[29]

It is this type of breach of good faith that will impose liability for punitive

[20]*See* Slater v. Motorists Mut. Ins. Co., 174 Ohio St. 148, 187 N.E.2d 45 (1962).

[21]*See* Hart v. Rep. Mut. Ins. Co., 152 Ohio St. 185, 87 N.E.2d 347 (1949).

[22]*See* Ketcham v. Miller, 104 Ohio St. 372, 136 N.E. 145 (1922).

[23]*See* Hart v. Rep. Mut. Ins. Co., 152 Ohio St. 185, 87 N.E.2d 347 (1949), Slater v. Motorists Mut. Ins. Co., 174 Ohio St. 148, 187 N.E.2d 45 (1962).

[24]*See Slater,* 174 Ohio St. 148, 187 N.E.2d 45 (1962).

[25]*See Hart,* 152 Ohio St. 185, 87 N.E.2d 347 (1949).

[26]6 Ohio St. 3d 272, 277, 452 N.E.2d 1315, 1320 (1983) (citing Sweet v. Grange Mut. Casualty Co., 50 Ohio App. 2d 401, 364 N.E.2d 38 (1975)).

[27]42 Ohio St. 2d 178, 184, 327 N.E.2d 654, 658 (1975).

[28]Escambia Treating Co. v. Aetna Casualty & Sur. Co., 421 F. Supp. 1367, 1371 (N.D. Fla. 1976).

[29]11 Cal. 3d 452, 462-63, 521 P.2d 1103, 1110, 113 Cal. Rptr., 711, 720 (1974).

damages. The culpable mental state for the breach of good faith must be greater than bad judgment or negligence.[30] Plaintiff must show that the insurer intentionally disregarded its contractual obligations and injured a person or his property.[31] In order to obtain punitive damages, the plaintiff must show the defendant had actual malice in breaching the contract.[32] Not only must the defendant have an actual malicious and evil intent, but this intent must be specifically directed at the insured.[33] Therefore, conduct that might breach a duty of good faith does not always justify the award of punitive damages.[34]

The Ohio Supreme Court applied these principles to the case at hand, to determine whether there was actual malice on the part of the defendant. The court concluded that the complaint and the record did not disclose the necessary facts to find a cause of action in punitive damages.[35] The court's decision hinged on whether or not the defendant displayed actual malice in its initial determination that Mrs. Hoskins was in a convalescent facility. The court examined the various characteristics of the nursing area to which Mrs. Hoskins was transferred and inferred that the similarities to the actual policy provisions were close enough that actual malice could not be found.[36] The vital element of actual malice that seemed to be missing was that the defendants did have an initial reasonable justification for denying liability.

Next, the court addressed the plaintiff's contentions that the defendant's failure to notify and to investigate were sufficient to award punitive damages.[37] The court responded that the defendant's conduct merely showed inaction.[38]

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[30]*See* Columbus Finance, Inc. v. Howard, 42 Ohio St. 2d 178, 327 N.E.2d 654 (1975).

[31]*See Hart,* 152 Ohio St. 185, 87 N.E.2d 347 (1949).

[32]6 Ohio St. 3d 272, 277, 452 N.E.2d 1315, 1320 (1983) (citing Columbus Finance, Inc. v. Howard, 42 Ohio St. 2d 178, 327 N.E.2d 654 (1975)).

[33]*See* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

[34]Sweet v. Grange Mutual Cas. Co., 50 OHIO APP. 2d 401, 364 N.E.2d 38 (1975) "the Plaintiff was a disabled veteran on a fixed disability income and carried collision insurance with the defendant. After an auto accident in which all three estimates figured the auto as totaled, the defendant tried to force plaintiff into accepting a lesser sum or a fix it process called a clip. The court said:

> We find that such an offer or proposal . . . to be consistent only with a willful intent to breach the contract. This conduct, coupled with Grange's knowledge of Sweet's physical and financial condition and its threat to refuse to pay for further storage unless the offer was accepted, could be found by the jury to be malicious or wanton or oppressive so as to entitle Sweet to punitive damages.

Id. at 406, 364 N.E.2d at 41.

In *Ali v. Jefferson Ins. Co.,* 5 OHIO APP. 3d 105, 449 N.E.2d 495 (1982), the plaintiff owned a tractor trailer and was involved in an accident. The insurer made a series of bad faith appraisals, and the insurer was also aware that plaintiff's tractor trailer would be repossessed within a defined time limit if there was no settlement. The appellate court stated:

> We find that where an insurance company in failing to settle a claim of an insured is so unreasonable and oppressive, as to constitute a willful breach of its obligations under the policy, actual malice is established and punitive damages may be awarded.

Id. at 108, 449 N.E.2d at 498.

[35]6 Ohio St. 2d 272, 278, 452 N.E.2d 1315, 1321 (1983).

[36]*Id.* at 278, 452, N.E.2d at 1322.

[37]*Id.* at 279, 452 N.E.2d at 1322.

[38]*Id.*

According to Prosser, a breach of contract by nonfeasance will ordinarily not be enough to assess tort liability which justifies punitive damages.[39] Misfeasance, on the other hand, equates to affirmative action on the part of the insurance company and the potential assessment of punitive damages.[40] The court considered the fact that the defendant had made an effort to determine if the hospital had convalescent facilities and if Mrs. Hoskins was located there.[41] The insurance representative also notified her supervisor who then reviewed the file and felt that defendant's decision was correct.[42] The court concluded that based upon "the totality of these factors, there is insufficient evidence to indicate that the appellant acted with actual malice . . . ."[43] Therefore, since there was no improper performance, i.e., affirmative action on the part of the defendant, no action for punitive damages could lie.

The court's decision in *Hoskins* will promote substantial ligitation. In this case, the Supreme Court of Ohio limited the relief to the contractual remedy as rendered by the trial court. The court stated there was no breach of bad faith justifying punitive damages. The court seemed to imply there is no remedy for a bad faith breach without malice beyond contract expectations. This distinction seems to project the possibility of a wrong without a remedy.

In prior refusal-to-settle cases, the Ohio Supreme Court had imposed the standard of good faith on insurers when they had the sole responsibility to settle or litigate a third party's claim against the insured.[44] If the insurer was shown to have no reasonable justification for his failure to settle or litigate, the court allowed damages that were in excess of the policy.[45] This damage remedy was compensatory in nature. It made the party whole by assessing damages equal to the excess assessed against the insured above his policy limits.[46] Additionally, in Ohio, punitive damages could be assessed in cases that involved ingredients of fraud, malice, or insult.[47] Therefore, in the refusal-to-settle area, there existed a three tier level of remedy. The first tier was an action for breach of contract which compensated the injured party. The second tier would be a breach of good faith which would allow compensatory damages and the third tier would be an assessment of punitive damages.

After the *Hoskins* decision, this three tier system seems to be less distinguishable. The court's own terminology in finding insufficient facts to find a tort justifying punitive damages seems to exclude the possibility of com-

[39] *Id.* The court relied on W. PROSSER, LAW OF TORTS § 92 (4th ed. 1971).

[40] 6 Ohio St. 3d at 279, 452 N.E.2d at 1322 (1983).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 275, 452 N.E.2d at 1319.

[45] *See Hart,* 152 Ohio St. 185, 87 N.E.2d 347.

[46] *See Id.* at 188, 87 N.E.2d at 349.

[47] *See* Roberts v. Mason, 10 Ohio St. 278 (1859).

pensation solely for the breach of good faith. The court is very careful to differentiate between conduct that necessitates bad faith only and that which could invoke punitive damages.[48]

The expectation of the insured is to have coverage when a valid claim is submitted. If the insurer breaches this contract, then the parties might be made whole by simply paying the benefits expected under the contract. This remedy might be sufficient even when the breach is in bad faith.[49] However, if additional damages result from the breach of the duty of good faith and are not allowed, then the court is ignoring possible significant consequential damages. These damages may include those that would not have occurred if payment had not been wrongfully withheld.[50] As an example, some jurisdictions consider emotional distress damages justifiable due to the relationships of the parties,[51] or the expectations of the parties.[52] The very risks insured against presuppose that if and when a claim is made, the insured will be disabled and in strait financial circumstances and therefore, particularly vulnerable to oppressive tactics on the part of an economically powerful entity.

In Ohio, the Supreme Court recently recognized that a cause of action may be stated for the negligent infliction of serious emotional distress without a contemporaneous physical injury.[53] The level of culpability constituting negligence is far below the level present in proven instances of bad faith, where the harm is intentional by definition. Ohio has also recognized that an award of emotional distress can occur where precipitated by conduct which is a malicious invasion of a personal right.[54] Parties contract (for insurance) with the expectation of being free of worry. Therefore, emotional and mental distress damages should be considered as an appropriate remedy, under proper proof, for the tort of bad faith.

Another potential damage to be awarded as compensation for the breach

[48]6 Ohio St. 3d at 278, 452 N.E.2d at 1321 (1983). An analogy might be helpful to see the distinctions. As a driver of an auto approaches an intersection, he sees that the light is turning yellow and he realizes that it will be red before he goes by. This driver also notices that there is no specific car approaching the intersection that he may collide with if he proceeds. If the driver proceeds through, his conduct is an intentional disregard of a known duty, but the harm that may be created is not aimed at anyone in particular. This conduct corresponds to bad faith. The difference for finding malicious conduct is that as the driver approaches the yellow light, he realizes that there is a specific car in his potential path. If he goes through this yellow light, it is not only an intentional disregard of a known duty but the potential harm is specifically directed at a known party.

[49]*See* Caradonna v. Thorious, 17 Mich. App. 41, 169 N.W.2d 179 (1969).

[50]*See* Lynch v. Mid America Fire and Marine Ins. Co., 94 Ill. App. 3d 21, 418 N.E.2d 421 (1981).

[51]*See* Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); Silberg v. California Life Insurance Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

[52]*See* Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 404, 89 Cal. Rptr. 78, 95 (1970). *Accord* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr 711 (1974); Santilli v. State Farm Life Ins. Co., 278 Ore. 53, 562 P.2d 965 (1977).

[53]*See* Schultz v. Barberton Glass Co., 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983) (citing Miller v. Baltimore & Ohio Southwestern R.R. Co., 78 Ohio St. 309 (1908)).

[54]*But see* Hamilton v. East Ohio Gas Co., 47 Ohio App. 2d 55, 351 N.E.2d 775 (1973).

of bad faith would be the payment of attorney's fees. In Ohio, attorney's fees are not recoverable in a tort action in the absence of an award of punitive damages.[55] The fact that parties to a contract might have expectations that litigation would be necessary in a good faith dispute does not equate to the bad faith situation where litigation was prompted by an unforseeable expectation and hence attorney fees would be a consequential damage arising from the bad faith breach.[56]

Since the court in the past has implicitly accepted the three tier system in the refusal-to-settle case law, it should be extended to refusal to pay the insured cases. Potential consequential damages should be recognized and remedied in this area of the law. There is a great difference between contract expectations awarded to a plaintiff as compensation and punishment to insurance companies in the form of punitive damages for malicious conduct to their insureds. The award of consequential damages beyond contract expectation is not meant to impose an unfair burden on the insurance companies, who must be able to assert their legal right in good faith.[57] Consequential damages should only be awarded when the insurance company breaches that duty of good faith and yet does not engage in malicious behavior that allows punitive damages to be awarded.

A second source of potential litigation presented by the *Hoskins* decision is the distinction the court attempts to draw between affirmative acts as constituting conduct sufficient for the award of punitive damages and omissive acts which do not allow punitive damages.[58] The court viewed these acts in the context of misfeasance or nonfeasance in the performance by the insurer of his contractual obligations.[59] The first claim by the plaintiffs for punitive damages was dismissed by the court because the insurer had an initial good faith justification in changing the status of the policy coverage when Mrs. Hoskins' room change occurred.[60] The burden of showing that the preconditions exist for payment generally falls on the insured.[61] However, the inconsistency seems to occur after the insurer rejects the initial claim in good faith. The issue is whether the court will continue to hold the insurer to a good faith standard if the insured continues to present evidence that the claim is valid. In the refusal-to-settle cases relied on by the court, the insurer was held to a duty to settle or litigate a third party claim in good faith throughout the entire process.[62] This duty for continuing good faith negotiations in the refusal to

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[55]*See* Columbus Finance Inc. v. Howard, 42 Ohio St. 2d 178, 327 N.E.2d 654 (1975).

[56]*See* Lynch v. Mid America Fire and Marine Ins. Co., 94 Ill. App. 3d 21, 418 N.E.2d 421 (1981).

[57]*See* Jones v. Abriani, 169 Ind. Ct. App. 556, 350 N.E.2d 635 (1976).

[58]6 Ohio St. 3d at 279, 452 N.E.2d at 1322 (1983).

[59]*Id.*

[60]*Id.*

[61]Craft v. Economy Fire and Cas. Co., 572 F.2d 565 (7th Cir. 1978).

[62]*See Hart*, 152 Ohio St. 185, 87 N.E.2d 347; *Slater*, 174 Ohio St. 148, 187 N.E.2d 45.

pay claims has already been recognized in the Ohio lower courts[63] and in other jurisdictions.[64] Therefore, the insurer should be held to a duty of good faith throughout the entire process.

The court emphasized that bad faith behavior does not result in punitive damages if the actions of the insurer are omissive.[65] This rationale hinged on the idea that tort liability will not be assessed for nonfeasance of a contractual obligation which in essence is complete nonperformance.[66] Liability will be assessed in tort only for misfeasance of a contractual obligation, which is the improper performance of the obligation.[67] For the initial good faith refusal to pay this distinction is valid.

However, even after an initial good faith refusal, the good faith standard should continue for any further negotiations. At this juncture, the insurer knows that there is a dispute as to liability because the insured presents continuing evidence as to the validity of the claim. The insurer now refuses to investigate the claim any further. This situation places the insurer in a very advantageous position due to his financial reserves while the insured may be facing financial ruin.[68] The very expectation that originally prompted the insured to acquire insurance now confronts him.[69] To determine that the inaction of the insurer in this situation cannot amount to a commissive act seems to be naive. The insurance company under the court's holding can simply play a wait and see game with the insured regardless of the validity of further claims by the insured.

In conclusion, the *Hoskins* decision imposed a good faith duty upon an insurer in making its decision on whether or not to pay claims made by the insured. Good faith is defined as having a reasonable justification for any refusal to pay a claim. Public policy will not impose penalties on the insurer when he employs good faith in disputing a claim because he has a legal right due to the contractual nature of the relationship. The breach of good faith must be accompanied by a culpable mental state that borders on fraud, malice or ill will. If this duty is breached, punitive damages may be considered. Punitive damages will not be awarded unless the insurer displays actual malice. Actual malice needs both intentional wrong and intent to harm a specific party. In

[63] *See* Sweet v. Grange Mut. Casualty Co., 50 Ohio App. 3d 401, 364 N.E.2d 38 (1975).

[64] *See* Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976); Findley v. Time Ins. Co., 264 Ark. 647, 573 S.W.2d 908 (1978); Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

[65] 6 Ohio St. 3d at 278, 452 N.E.2d at 1321. *Accord* Lynch v. Mid America Fire and Marine Ins. Co., 94 Ill. App. 3d 21, 418 N.E.2d 421 (1981); Findley v. Time Ins. Co., 264 Ark. 647, 573 S.W.2d 908 (1978).

[66] 6 Ohio St. 3d at 278, 452 N.E.2d at 1322.

[67] *Id.*

[68] *See* McDowell v. Union Mut. Life Ins. Co., 404 F. Supp. 136 (N.D. Cal. 1975); Santilli v. State Farm Life Ins. Co., 278 Ore. 53, 562 P.2d 965 (1977); Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 2d 376, 89 Cal. Rptr. 78 (1970).

[69] *See* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).

Hoskins, the court found that the failure to take any action after an initial good faith refusal does not demonstrate circumstances or conduct sufficient to find malice. However, the court seems to ignore that just because actual malice cannot be shown that the tort of breach of good faith cannot provide some remedies. These remedies should be to compensate for mental distress and attorneys' fees. The court also fails to apply its own standard of malicious conduct to the actions of the insurer in the face of adequate proof that the initial good faith refusal was wrong. This seems to unduly limit the scope of conduct that can constitute malicious behavior. The court's standard will promote litigation and undermine the original intent of imposing a duty of good faith upon insurers in insurance contract claims, which was to facilitate just settlement with the insured.

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