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Title Insurance: Recovery for Emotional Distress for Wrongful Failure to Defend

One of the benefits¹ title insurance policies are designed to provide is a powerful, tenacious defender when a potential adverse claimant challenges the validity of the insured's title.² However, because the title insurance company often has little to lose

1. The title insurance industry has received much criticism in recent years. The basic problem seems to be that few benefits are received for the price paid for title insurance. Johnstone, *Title Insurance*, 66 YALE L.J. 492, 494-95 (1957); Quiner, *Title Insurance and the Title Insurance Industry*, 22 DRAKE INS. L. ANN. 711 (1973); Roberts, *Title Insurance: State Regulation and the Public Perspective*, 39 IND. L.J. 1, 5 (1963). Attempted attacks on or reforms of the title insurance industry have focused on three general areas. First, attempts have been made to increase legislative control of the industry at the state and national level. *Mortgage Settlement Costs: Hearings on S. 2775 Before the Subcomm. on Banking, Housing, and Urban Affairs*, 92d Cong., 2d Sess. (1972). A recent article on title insurance summarizes the state of legislation in this area as follows:

The environment in which title insurance operates seems very conducive to profit. State regulation seems to be lacking. Strict regulation systems do not appear to be prevalent, and in general, regulation is not as effective as with property and casualty insurance. Moreover, title insurance companies are operated predominately in oligopolies.

Quiner, *supra* at 727. The legislative approach to solving the problems of title insurance seems to have lost momentum in recent years.

Second, in the absence of legislative action, opponents of the title insurance industry have turned to the courts in an effort to regulate the industry under the federal antitrust acts. The thrust of their argument has been that the title insurance industry is monopolistic and devoid of any meaningful price competition and should, therefore, be broken up and regulated by the federal antitrust laws. See, e.g., *Crawford v. American Title Ins. Co.*, 518 F.2d 217 (5th Cir. 1975); *Schwartz v. Commonwealth Land Title Ins. Co.*, 384 F. Supp. 302 (E.D. Pa. 1974); *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77 (10th Cir. 1973). These cases held, however, that title insurance is "insurance," as the word is used in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1970), and qualifies for the insurance exemption from federal antitrust laws. Because of this interpretation by the courts, this approach has not been successful. See Note, *The Applicability of Anti-trust Laws to the Insurance Industry*, 22 DRAKE L. REV. 810 (1973).

A third approach relies upon general insurance law concepts and asks the courts to broadly interpret the duties owed by title insurers to their clients. Examples of this approach include the courts' willingness to find a "duty to search" from the surrounding circumstances, which allows a recovery in tort notwithstanding the contract provisions. For an excellent summary of this topic, see Comment, *Title Insurance: The Duty to Search*, 71 YALE L.J. 1161 (1962) [hereinafter cited as *Duty to Search*].

2. Title insurance has been criticized as being a marginal investment for a homeowner. Roberts, *supra* note 1, at 5; Johnstone, *supra* note 1, at 494. Commentators generally agree, however, that "[o]ne advantage that title insurance provides over other forms of title protection is that the title insurer agrees to defend at its expense all litigation against the insured based upon a title defect covered in the policy." Johnstone, *supra* note 1, at 499-500. Roberts, *supra* note 1, at 4, states: "Most significant, perhaps, is the fact that the company undertakes to defend the title as insured: in effect, if nothing else, the vendee has retained a powerful champion against the day a potential adverse claimant appears."

by refusing to defend when policy coverage is in doubt, the insured may find himself without a defender.³ The insurer's refusal to defend may result in inconvenience, lost business opportunities, and mental distress to the insured—none of which can be recovered using traditional remedies.⁴ In the recent California case of *Jarchow v. Transamerica Title Insurance Co.*,⁵ however, the jury awarded damages of \$200,000 for emotional distress caused by the title insurer's wrongful failure to defend.⁶ This comment will briefly review traditional remedies for wrongful failure to defend under title insurance policy terms and discuss recent developments that may provide remedies that encourage title insurers to defend.

I. DUTIES OF INSURERS AND REMEDIES FOR BREACH

A. *The Duty to Defend*

Title insurance policies generally contain a clause that obligates the company to defend the insured to the extent the dispute involves an alleged defect covered by the policy.⁷ General insurance law looks to the face of the complaint to determine whether the injuries are within the terms of the policy coverage.⁸ Under this rule, if the formal claim against the insured alleges facts within the coverage of the policy, the insurer is obligated to

3. If a title insurer refuses to defend, forcing the insured to defend his title, and the court finds no policy coverage, then the title insurer incurs no liability. If, however, the court determines that the title policy covered the defect, then the company is liable for costs and losses incurred by the insured in defending the action. Further, the insurer is bound by the material findings of fact in the suit against the insured and is liable for judgments or reasonable settlements that result. The insured may, however, have to bring a second action against the insurer to enforce the holding of the first action. See Curtis, *Title Assurance in Sales of California Residential Realty: A Critique of Title Insurance and Title Covenants with Suggested Reforms*, 7 PAC. L.J. 1, 15-16 (1976); 9 J. APPLEMAN, *INSURANCE LAW PRACTICE* § 5216 (1943). If there is any question of policy coverage, the insurer often comes out ahead by refusing to defend. If it is determined that there was no coverage, the insurer has saved the costs of defense; if it is determined that the policy did cover the title defect, the insurer often incurs no greater cost than if he had defended.

4. See text accompanying notes 22-28 *infra*.

5. 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (Ct. App. 1975).

6. *Id.* at 925, 122 Cal. Rptr. at 476.

7. E. RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 1011, 1020 (1974); 9 J. APPLEMAN, *supra* note 3, § 5216.

8. 7A J. APPLEMAN, *supra* note 3, § 4683; R. KEETON, *INSURANCE LAW* § 7.6(a) (1971); Comment, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 U. PA. L. REV. 734, 734-35 (1966) [hereinafter cited as *Duty to Defend*]; Note, *The Insurer's Duty to Defend Made Absolute: Gray v. Zurich*, 14 U.C.L.A. L. REV. 1328 (1967) [hereinafter cited as *Duty to Defend Made Absolute*]. Of course, the insurer has the burden of proof in cases where the pleadings are ambiguous. 7A J. APPLEMAN, *supra* note 3, § 4683, at 440.

defend, regardless of the true nature of the facts.⁹ Conversely, the insurer is under no obligation to defend if the allegations do not fit within the policy coverage, regardless of the actual details.¹⁰

This rule is criticized as being inadequate under today's relaxed pleading requirements, which are designed only to put the opposing party on notice—the complaint often will not precisely reflect the opposing party's claim or predict the basis of any relief.¹¹ For example, the complaint may allege only that the insured is encroaching on the plaintiff's land. Since such a general complaint could potentially involve numerous situations, it is not always a simple task to determine from the face of the complaint whether the title insurance company has a duty to defend.¹²

Although a title insurance policy usually purports to guarantee "good and indefeasible title" to the property described by the policy,¹³ this guarantee is subject to numerous standard and specially listed exceptions.¹⁴ The standard exceptions usually exempt from coverage any cloud on the title created by instruments or acts that are not recorded in public records.¹⁵ Also excluded from coverage are clouds on the title that occur as a result of unpatented mining claims, water right claims, governmental regulations, and eminent domain actions.¹⁶ Any cloud on the title found by searching the public records is listed as a special exception.¹⁷ These standard and specially listed exceptions, which frequently turn upon technical rules as to what constitutes record notice,¹⁸ taken together with the complexity of real property law, often make it difficult to determine from the pleadings whether

9. *Duty to Defend Made Absolute*, *supra* note 8, at 1328-29.

10. *Id.*

11. *Duty to Defend*, *supra* note 8, at 734-35.

12. See Curtis, *supra* note 3, at 16. A complaint alleging that the insured is encroaching on the plaintiff's land may or may not involve a title dispute that concerns the insurer. The insured may have driven on the plaintiff's land without permission, or perhaps erected a fence on his neighbor's land. It is often impossible to tell from the pleadings exactly what the true nature of the problem is.

13. 9 J. APPLEMAN, *supra* note 3, § 5201, at 2.

14. Johnstone, *supra* note 1, at 494-97; E. RABIN, *supra* note 7, at 1017-18.

15. In addition, standard title insurance policies generally exclude facts, rights, interests, or claims not shown by the public record but which could be ascertained by inspection of the land or by inquiry of persons in possession thereof. As a result of this exclusion, the policyholder has no insurance against easements, encroachments, rights of lessees in possession, boundary discrepancies, or similar matters. Curtis, *supra* note 3, at 5-7.

16. E. RABIN, *supra* note 7, at 1017-18.

17. Johnstone, *supra* note 1, at 496. Because of these exceptions title insurers, unlike other kinds of insurers, assume very little risk. *Id.* at 496-97. For a comprehensive description of the risks assumed by title insurers, see *id.* at 495-96.

18. Curtis, *supra* note 3, at 2.

a duty to defend exists.¹⁹

Reflecting these criticisms, many states have modified the general rule by creating a duty to defend whenever facts reasonably known to the insurer would create a "potential of liability."²⁰ The California court in *Jarchow* articulated the problem:

The rule regarding an insurer's duty to defend really can take no other form; otherwise the insured would be required to finance his own defense and then, only if he is successful, hold the insurer to its promise by means of a second suit for reimbursement. If this construction were followed, a basic reason for the purchase of insurance would be defeated: instead of having purchased insurance against the trauma and financial hardship of litigation, the insured will have found that he has purchased nothing more than a lawsuit.²¹

A duty to defend measured by a potential of liability is obviously a stricter standard providing greater protection to the insured, particularly if appropriate remedies for wrongful failure to defend exist.

B. Remedies

1. Contract remedies

An insurance policy is a contract.²² If an agreement to defend is part of the contract, then wrongful failure to defend is a breach of contract and contract remedies are appropriate. When an insurer wrongfully refuses to defend the validity of the insured's

19. *Id.* at 16. An additional problem, unique to title insurance, occurs when a defect covered by the title insurance policy exists and is known to the insured, but no adverse party has instituted suit. The question then becomes whether the insurer has a duty to defend by initiating a quiet title action. Very little case law exists on the subject, but it appears that an obligation exists on the part of the insurer to take affirmative action. See *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 943 n.18, 122 Cal. Rptr. 470, 488 n.18 (Ct. App. 1975); *Southern Title Guar. Co. v. Prendergast*, 494 S.W.2d 154 (Tex. 1973); 9 J. APPLEMAN, *supra* note 3, § 5215; 25 BAYLOR L. REV. 704 (1973); 8 Hous. L. REV. 580 (1971).

20. *Duty to Defend Made Absolute*, *supra* note 8, at 1330. The following are cases in some of the states that follow the "potential of liability" standard in determining the existence of a duty to defend: *Farris v. United States Fidelity & Guar. Co.*, 542 P.2d 1031 (Ore. 1975); *Evans v. Employer's Mut. Liab. Ins. Co.*, 391 F. Supp. 1230 (D.C. Alas. 1975); *American Employers' Ins. Co. v. Crawford*, 87 N.M. 375, 533 P.2d 1203 (1975); *Spruill Motors, Inc. v. Universal Underwriters Ins. Co.*, 212 Kan. 681, 512 P.2d 403 (1973); *First Ins. Co., Ltd. v. Continental Cas. Co.*, 466 F.2d 807 (9th Cir. 1972) (Hawaii); *Shaw v. Aetna Cas. & Sur. Co.*, 407 F.2d 813 (7th Cir. 1969) (Illinois); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

21. 48 Cal. App. 3d 917, 942-43, 122 Cal. Rptr. 470, 488 (Ct. App. 1975).

22. 9 J. APPLEMAN, *supra* note 3, § 5201, at 1-2.

title, the insured is entitled to recover reasonable expenses in making the necessary defense.²³ These generally include attorneys' fees and any reasonable settlement accepted by the insured in good faith.²⁴ As a general rule, damages for mental suffering are not available in breach of contract actions, nor are other consequential damages, such as lost business opportunities or inconvenience, since they usually are not considered within the expectations of the contracting parties.²⁵

A distinction is drawn, however, between commercial contracts, which promote a pecuniary or business interest (no emotional distress damages allowed), and personal contracts, such as contracts with common carriers or innkeepers, which promote some personal interest (emotional distress damages allowed).²⁶ Historically, courts have viewed insurance contracts as commercial in nature and have not allowed damages for emotional distress.²⁷ It is generally felt that one contracting for insurance seeks a pecuniary benefit and that neither party bargains for or expects mental distress to accompany a breach of contract.²⁸

23. *Id.* § 5216, at 23.

24. *Id.*; see note 3 *supra*.

25. 5 A. CORBIN, CONTRACTS § 1076, at 429 (1964); 11 W. WILLISTON, CONTRACTS § 1341, at 214 (3d ed. 1968).

26. See 5 A. CORBIN, CONTRACTS § 1076, at 429 (1964). The most common types of contracts that are considered personal are contracts to marry, contracts of carriers and innkeepers with passengers and guests, contracts for the disposition of dead bodies, and contracts for the delivery of death messages. The common element in personal contracts is the deep feelings involved, which make mental distress likely upon breach of contract. See Note, *Damages for Mental Suffering Caused by Insurers: Recent Developments in the Law of Tort and Contract*, 48 NOTRE DAME LAW. 1303, 1303-04 (1973).

27. "The traditional measure of contract damages limits recovery to the policy benefits plus interest. *New Orleans Ins. Ass'n v. Piaggio*, 83 U.S. (16 Wall.) 378 (1872). Where consequential damages are sought the limitations of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854) control." Comment, *Damages for Mental Suffering Caused by Insurers; Recent Developments in the Law of Tort and Contract*, 48 NOTRE DAME LAW. 1303, 1304 n.9 (1973). That is, the damages must arise naturally from such breach of contract itself and have been reasonably contemplated by both parties at the time of the contract. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 206, at 330 (1970).

28. See Note, *Damages Assessed Against Insurers for Wrongful Failure to Pay*, 10 WM. & MARY L. REV. 466, 467 (1968). Recently, some courts have been swayed by the argument that insurance contracts are personal, making it easier for the courts to take the position that damages for emotional distress should be awarded in appropriate cases. For example, in *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967), the court argued that:

Moreover, plaintiff did not seek by the contract involved here to obtain a commercial advantage but to protect herself against the risks of accidental losses, including the mental distress which might follow the losses. Among the considerations in purchasing liability insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss, and recovery of damages for mental suffering has been permitted for breach of con-

2. *Tort remedies*

In view of the inadequacy of breach of contract remedies in redressing the insured's injuries, insurance policyholders of all kinds have turned to tort law to find a more satisfactory basis for recovery.²⁹ If a cause of action in tort can be maintained, the possibility of recovery for emotional distress, inconvenience, and lost business opportunities exists.³⁰ The tort actions of intentional and negligent infliction of emotional distress and breach of implied covenant of good faith and fair dealing focus on damages for emotional distress and have been used with some success to redress injuries caused by breach of insurance contracts.³¹ Courts require claims of emotional distress to meet very stringent standards, however, because of the difficulty of proving and measuring mental injuries and the possibility of vexatious and fictitious claims.³²

Early courts refused to allow any recovery for mental distress unless it could be brought within the scope of some already exist-

tracts which directly concern the comfort, happiness or personal esteem of one of the parties.

Id. at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19. The court did not, however, decide the case on the distinction between personal and commercial contracts, but found an intentional tort, thus making damages for emotional distress available. *Id.* The general rule is still that an insurance contract is a commercial contract, the breach of which will not support an award of damages for emotional distress. See *Farris v. United States Fidelity & Guar. Co.*, 542 P.2d 1031, 1035-36 (Ore. 1975).

29. See Note, *The Widening Scope of Insurer's Liability*, 63 Ky. L.J. 145, 148 (1975).

30. The greatest advantage in suing in tort comes from the likelihood of greater damages, since the limitations imposed by the contract on the maximum damages recoverable may be avoided. See, e.g., *Quigley v. St. Paul Title Ins. & Trust Co.*, 60 Minn. 275, 62 N.W. 287 (1895); Annot., 60 A.L.R.2d 972 (1958). In addition, tort theory may extend to items of damage not includible under contract theory (such as emotional distress damages), may allow the plaintiff to avoid possible setoffs or counterclaims, and may provide a lighter burden of proof in some instances. W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 92, at 618-22 (4th ed. 1971). Tort theory also provides the court with a more flexible method of achieving equitable results.

Contract theory, however, offers advantages such as a lighter burden of pleading and proof in some instances, a longer statute of limitations, recovery of bargain damages, recovery of interest from the date of the breach, survival of the action, additional remedies such as summary judgment or attachment, and greater opportunities for forum shopping. See *Duty to Search*, *supra* note 1, at 1182 n.114.

31. See, e.g., *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973)(breach of an implied covenant of good faith and fair dealing); *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972)(intentional infliction of emotional distress); *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (Ct. App. 1975)(negligent infliction of emotional distress).

32. W. PROSSER, *supra* note 30, § 12, at 50-51; *RESTATEMENT (SECOND) OF TORTS* § 46, Comment b at 72 (1965).

ing tort, such as false imprisonment or assault.³³ Requiring that damages for emotional distress be "parasitic" or dependent upon the existence of an independent tort was thought to assure the genuineness of the claim.³⁴

Eventually an independent cause of action was recognized for infliction of emotional distress, even in the absence of some other harm, when the defendant's behavior was of such a nature that he knew or should have known that mental distress was inevitable.³⁵ The genuineness of claims under this tort, the intentional infliction of emotional distress, was insured by requiring the defendant's behavior to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."³⁶ In cases such as these, courts have allowed damages for mental distress upon proof that the defendant's conduct was outrageous and that the plaintiff suffered severe emotional distress.³⁷

Courts have been reluctant to award damages for emotional distress inflicted by mere negligence.³⁸ If the negligent act causes only mental distress that is not serious enough to produce physical symptoms, such as inability to sleep, loss of weight, ulcers, or personality changes, there is general agreement that no recovery is allowed.³⁹ Most courts feel that without some physical manifestation of the mental injury, the indicia of genuineness are lacking.⁴⁰ On the other hand, if physical injury such as a broken leg, is an immediate result of the defendant's negligent act, most courts allow parasitic damages for emotional distress, with slightly relaxed criteria of proof.⁴¹ Thus, if severe emotional distress accompanies a broken leg, damages are appropriate not only for the broken leg but also for the emotional distress. The immediate physical harm is thought to authenticate the claim for emotional distress.⁴²

33. See *Davis v. Western Union Tel. Co.*, 46 W. Va. 48, 32 S.E. 1026 (1899); 46 Miss. L.J. 871 (1975).

34. See 63 GEO. L.J. 1179, 1183 (1975).

35. See W. PROSSER, *supra* note 30, § 12.

36. Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 44 (1956).

37. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

38. Greyson, *Recent Developments in the Negligent Infliction of Emotional Shocks*, 3 N. Ky. St. L.F. 76, 82 (1975).

39. See *id.* at 82-83.

40. See *id.*

41. See *id.* at 83.

42. *Id.*

Where the physical symptoms are not immediate, but follow subsequently as a result of the shock created by the defendant's negligent act, the law is not as straightforward. Originally, damages for emotional distress in such cases were awarded only when accompanied by some "impact" upon the person of the plaintiff during the course of the negligent act.⁴³ The presence or absence of impact, however, is often a chance occurrence that has little effect on the degree of seriousness of mental distress. The rigid application of the rule often creates outrageous results.⁴⁴ In *Mitchell v. Rochester Railway Co.*,⁴⁵ for example, a horsedrawn trolley charged the plaintiff, not stopping until the horses were standing on either side of her. The plaintiff fainted and subsequently suffered a miscarriage.⁴⁶ The court nevertheless denied recovery because it found that she had not experienced an impact; mere fright was not sufficient to sustain the action.⁴⁷

Modern courts have, for the most part, rejected the impact rule, and now require that the plaintiff be within a "zone of danger" and reasonably fear for his own safety.⁴⁸ The application of this test can also produce harsh results in that it prevents recovery by individuals who do not fear for their own safety (are outside the zone of danger) but nonetheless suffer genuine emo-

43. Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1239 (1971) [hereinafter cited as *Negligently Inflicted Mental Distress*]. See *Brisboise v. Kansas City Pub. Serv. Co.*, 303 S.W.2d 619 (Mo. 1957); *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958) (no impact from being chased by trespassing bull).

44. This rule created strained results. Many courts went to absurd lengths to find "impact." See, e.g., *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S.E. 680 (1928) (evacuation of horse's bowels in lap); *Zelinsky v. Chimics*, 196 Pa. Super. 312, 175 A.2d 351 (1961) (minor auto collision sufficient impact). Other courts used the impact rule to deny recovery for serious mental distress in all cases, regardless of how serious the injury. See, e.g., *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 45 N.E. 354 (1896).

45. 151 N.Y. 107, 45 N.E. 354 (1896).

46. *Id.* at 109, 45 N.E. at 354.

47. *Id.*

48. The impact rule has been rejected in most states. The following cases and states are cited in Note, *Recovery Allowed for Mental Distress Absent Both Impact and Fear of Impact*, 46 Miss. L.J. 871, 875 n.36 (1975), as still accepting the impact rule. *St. Louis I.M. & S.R.R. v. Bragg*, 69 Ark. 402, 64 S.W. 226 (1901) (Arkansas); *Perry v. Capital Traction Co.*, 32 F.2d 938 (D.C. Cir.), cert. denied, 280 U.S. 557 (1929) (District of Columbia); *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974) (Florida); *Braun v. Craven*, 175 Ill. 401, 51 N.E. 657 (1898) (Illinois); *Boston v. Chesapeake & Ohio Ry.*, 223 Ind. 425, 61 N.E.2d 326 (1945) (Indiana); *Kramer v. Ricksmeier*, 159 Iowa 48, 139 N.W. 1091 (1913) (Iowa); *Kentucky Traction & Terminal Co. v. Roman's Guardian*, 232 Ky. 285, 23 S.W.2d 272 (1929) (Kentucky); *Spade v. Lynn & B.R.R.*, 168 Mass. 285, 47 N.E. 88 (1897) (Massachusetts); *Brisboise v. Kansas City Pub. Serv. Co.*, 303 S.W.2d 619 (Mo. 1957) (Missouri); cf. *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961) (Utah).

tional distress.⁴⁹ A parent who witnesses the death of his child from the safety of his yard is a common example.⁵⁰ Several courts have attempted to deal with this problem,⁵¹ but the majority of jurisdictions find that the zone of danger test is necessary to insure that claims are genuine and that negligent individuals are not exposed to liability that they should not reasonably be expected to bear.⁵²

Application of the traditional impact or zone of danger tests, coupled with the requirement that mental distress be severe, has consistently led courts to deny damages for emotional distress when the emotional distress results from negligent damage to property.⁵³ *Valley National Bank v. Brown*⁵⁴ is typical of the approach used by most courts. The defendant, Valley National Bank, wrongfully and negligently garnished Brown's bank account. Brown, suing in tort, prayed for damages for emotional distress.⁵⁵ The court found that as no "physical invasion" of the plaintiff's person occurred, no damages for emotional distress would be allowed.⁵⁶ In *Murphy v. City of Tacoma*,⁵⁷ the plaintiff sought damages for emotional distress caused by a landslide that damaged his real property.⁵⁸ The court held that

there is no reason to deviate from the rule requiring either a showing of malice or some actual or threatened physical invasion of the person in order to warrant recovery of damages for "mental anguish, suffering, annoyance, discomfort and inconvenience."⁵⁹

49. See 63 Geo. L.J. 1179, 1186 (1975).

50. *Id.*; see, e.g., *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952).

51. Some courts have extended the scope of liability to allow recovery to individuals who directly witness an injury to a close relative and suffer severe emotional distress as a result. See, e.g., *D'Ambra v. United States*, 354 F. Supp. 810 (D.R.I.), *modified*, 481 F.2d 14 (1st Cir.), *cert. denied*, 414 U.S. 1075 (1973); *Dillon v. Legg*, 441 P.2d 912, 68 Cal. 2d 728, 69 Cal. Rptr. 72 (1969).

52. See, e.g., *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935).

53. See *Negligently Inflicted Mental Distress*, *supra* note 43, at 1242.

54. 110 Ariz. 260, 517 P.2d 1256 (1974).

55. *Id.* at 262, 517 P.2d at 1258.

56. *Id.* at 265, 517 P.2d at 1261. The Court found that:

[W]ith but a few minor exceptions, the rule is that where no malice or intent is shown, no damages may be awarded for mental anguish or distress of mind. The exception to the rule occurs when it is shown that there is a physical invasion of a person or the person's security. No such physical invasion occurred [sic] here . . . "no damages can be allowed for mental pain or suffering" in actions of this nature.

Id. (citations omitted).

57. 60 Wash. 2d 603, 374 P.2d 976 (1962).

58. *Id.*

59. *Id.* at 622, 374 P.2d at 988.

II. THEORIES OF LIABILITY

A. *Intentional Infliction of Emotional Distress*

All states that recognize the intentional infliction of emotional distress as an independent tort allow recovery for emotional distress in appropriate insurance cases.⁶⁰ In *Fletcher v. Western National Life Insurance Co.*,⁶¹ the plaintiff sustained a back injury in the course of his employment, rendering him unable to work. Examining experts were virtually unanimous in their assessment that the plaintiff was disabled because of his back injury.⁶² Despite overwhelming evidence of its liability, however, the insurer attempted to persuade the claimant to accept an unfavorable settlement. The insurer accused the insured of having misrepresented significant facts in his application for insurance, attempted to characterize the defect as congenital, and demanded return of money already paid.⁶³ The court awarded damages for intentional infliction of emotional distress, concluding that the conduct of the insurer was outrageous and deplorable.⁶⁴

The United States Court of Appeals for the Seventh Circuit applied Illinois law in *Eckenrode v. Life of America Insurance Co.*⁶⁵ and, like the California court in *Fletcher*, allowed damages for intentional infliction of emotional distress.⁶⁶ Following her husband's murder, the plaintiff in *Eckenrode* submitted a claim for the proceeds of an insurance policy on her husband's life. The insurance company, although fully aware that the plaintiff had a valid claim, repeatedly refused payment and attempted to coerce her into compromising her claim.⁶⁷ The court found that the insurance company was on notice of the plaintiff's sensitive state of mind following an event so ghastly as the murder of her husband and that, under the circumstances, the insurer abused its superior bargaining position by attempting to coerce a settlement.⁶⁸ In the court's view, such conduct was outrageous enough

60. Provided the requisite "outrageous" conduct and severe emotional distress were shown, there is no reason why recovery would not be granted. See text accompanying notes 35-37 *supra*.

61. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

62. *Id.* at 386-87, 89 Cal. Rptr. at 83.

63. *Id.* at 388-90, 89 Cal. Rptr. at 84-85.

64. *Id.* at 394-96, 89 Cal. Rptr. at 88-89.

65. 470 F.2d 1 (7th Cir. 1972).

66. *Id.* at 4-5.

67. *Id.* at 2.

68. *Id.* at 2-3.

to warrant damages for intentional infliction of mental distress.

In *Frishett v. State Farm Mutual Automobile Insurance Co.*,⁶⁹ the Michigan Court of Appeals held that an insured could recover for emotional distress caused by the insurer's wrongful acts, provided that such acts were done with the intent of causing emotional distress.⁷⁰ The insurer had wrongfully withheld medical payments, made false statements, and obtained information of a private nature to use against the plaintiff.⁷¹

The United States District Court for the District of Connecticut held that an insured could recover damages for intentional infliction of emotional distress where the insurer intentionally failed to defend or settle within the policy limits.⁷² The court, holding that an action would lie in contract, in tort, or in both, noted that even though the plaintiff's burden of proof might be difficult to meet, a cause of action had been stated.⁷³

It is clear that in those states that recognize an independent cause of action for intentional infliction of emotional distress, damages may be obtained if the conduct of the insurer meets the standards of outrageousness required. This, however, is of limited value to most title insurance policyholders, as it is only in rare circumstances that failure to defend title can be characterized as "outrageous" conduct. The vagaries of the exclusions attached to a title policy give ample opportunity to base refusal to defend on a relatively sound legal theory—at least one that can be invoked in good faith.⁷⁴ Thus, negligence, rather than outrageousness, is more often the label that will be applied by the courts to the conduct of title insurers.

B. Negligent Infliction of Emotional Distress

The impact and zone of danger tests severely limit the availability of a cause of action for negligent infliction of emotional distress when a title insurer wrongfully fails to defend. As discussed previously, states that continue to demand that there be some impact upon the plaintiff or that the plaintiff be within the zone of danger before negligent infliction of emotional distress is actionable generally refuse to recognize a cause of action when the

69. 3 Mich. App. 688, 143 N.W.2d 612 (Ct. App. 1966).

70. *Id.* at 614.

71. *Id.* at 612-13.

72. *United Servs. Auto. Ass'n v. Glens Falls Ins. Co.*, 350 F. Supp. 869 (D. Conn. 1972).

73. *Id.* at 872-73.

74. See text accompanying notes 12-19 *supra*.

emotional distress is a result of injury to a property right.⁷⁵ Several recent cases, however, have recognized an independent cause of action for negligent infliction of emotional distress or have used tests that allow recovery for mental distress caused by damage to a property interest.

In *First National Bank v. Langley*,⁷⁶ the plaintiff sought damages for emotional distress caused by the bank's negligence in searching for a lost deposit that had been placed in the night depository.⁷⁷ It took the plaintiff several weeks to persuade the bank to dismantle the mechanism of the night depository in an effort to recover the lost deposit. In the meantime, the plaintiff was suspected of stealing the deposit.⁷⁸ The Supreme Court of Mississippi held that a defendant whose negligence creates a foreseeable risk of mental distress can be held liable for genuine injuries that result from such distress.⁷⁹ The court expressly abandoned the impact rule and did not use the zone of danger rule to limit recovery.⁸⁰

In *Jarchow v. Transamerica Title Insurance Co.*,⁸¹ the court upheld a cause of action for negligent infliction of emotional distress.⁸² The plaintiff contended that as a result of the defendant's negligent title search he was unaware of potential adverse claims to the title of his property and suffered lost business opportunities, lost savings, and emotional distress when these claims were pursued.⁸³ The court concluded that if a plaintiff had suffered substantial damage apart from the emotional distress, recovery for damages for severe emotional distress would be allowed. The court reasoned that a plaintiff who has been deprived of the use or possession of real or personal property, or suffered physical injury, has suffered substantial damage that provides sufficient assurance of genuineness to allow recovery for emotional distress.⁸⁴ The court made it clear, however, that it does not yet recognize an independent tort for negligent infliction of emotional distress that would permit recovery when mental distress is the only damage caused by the defendant's wrongful conduct.⁸⁵ Yet,

75. See text accompanying notes 53-59 *supra*.

76. 314 So. 2d 324 (Miss. 1975).

77. *Id.* at 327-28.

78. *Id.*

79. *Id.* at 339.

80. *Id.*

81. 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (Ct. App. 1975).

82. *Id.* at 939-40, 122 Cal. Rptr. at 486.

83. See *id.* at 950-51, 122 Cal. Rptr. at 493.

84. *Id.* at 936-39, 122 Cal. Rptr. at 483-85.

85. *Id.* at 937 n.11, 122 Cal. Rptr. at 484 n.11.

by using a standard based upon substantial damage apart from the emotional distress, rather than the impact test or the zone of danger test, the California courts are approaching recognition of an independent tort for negligent infliction of emotional distress. In fact, the *Jarchow* court concluded that the "indorsement of such an action seems to be the logical end product of the decisional trends in this area."⁸⁶

The most straightforward treatment of damages for the negligent infliction of emotional distress is offered by the Supreme Court of Hawaii. In *Rodrigues v. State*,⁸⁷ the plaintiff's home was flooded due to the negligence of a state road maintenance crew.⁸⁸ The plaintiff sought damages for negligent infliction of serious mental distress as well as for injury to the home.⁸⁹ The court found that "the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection."⁹⁰ Artificial barriers to recovery, such as the impact or zone of danger tests, were not applied; rather, the court relied on general tort principles to determine the appropriateness of recovery.⁹¹

Although these cases indicate a trend to reject the impact and zone of danger rules and to rely instead on general negligence principles in negligent infliction of emotional distress cases, most jurisdictions are not presently willing to extend the scope of liability to allow damages for emotional distress resulting from negligent injury to a property interest. Consequently, as a remedy for failure to defend in title insurance cases, a cause of action for negligent infliction of emotional distress is generally not helpful.⁹²

C. Breach of an Implied Covenant of Good Faith

In several jurisdictions, every insurance contract is considered to contain an implied covenant of good faith and fair dealing.⁹³ Breach of this covenant gives rise to an independent tort

86. *Id.*

87. 52 Hawaii 156, 472 P.2d 509 (1970).

88. *Id.* at 159, 472 P.2d at 513.

89. *Id.* at 160, 472 P.2d at 513-14.

90. *Id.* at 174, 472 P.2d at 520.

91. *Id.* The court concluded that "the question of whether the defendant is liable [for damages for emotional distress] to the plaintiff in any particular case will be solved most justly by the application of general tort principles." *Id.* It is clear from the discussion in this case and the authorities cited that the impact and zone of danger rules are not considered general tort principles but are considered limitations on general tort principles.

92. See text accompanying notes 52-59 *supra*.

93. The following states appear to imply a covenant of good faith and fair dealing in each insurance contract: *Barnes v. Atlantic & Pac. Life Ins. Co. of America*, 325 So. 2d

action for "bad faith," notwithstanding that the acts complained of may also constitute a breach of contract.⁹⁴ As with most tort actions, the plaintiff may recover for all damages proximately resulting from the breach,⁹⁵ including any emotional distress suffered.⁹⁶

It is generally easier to carry the burden of proof in an action for breach of implied covenant of good faith than in an action for intentional or negligent infliction of emotional distress. The plaintiff need not show outrageous conduct or negligence on the part of the defendant.⁹⁷ Mere failure of the insurer to defend creates a cause of action. It also appears that the impact and zone of danger rules may not apply,⁹⁸ thus permitting recovery of damages for emotional distress caused by injury to a property interest. In *Jarchow*, for example, the defendant title insurer claimed that it did not have a duty to defend.⁹⁹ The court found that at the time of the suit, from the facts known to the insurance company, a potential of liability existed. Therefore, the insurer had a duty to defend. Breach of that duty was held to be a breach of the implied covenant of good faith and fair dealing.¹⁰⁰ The court awarded \$170 for loss of the use of the land, \$7100 for attorneys' fees, and \$200,000 for emotional distress.¹⁰¹

At present, because of its lighter burden of proof, an action for breach of an implied covenant of good faith and fair dealing appears to be the best approach for policyholders seeking to re-

143 (Ala. 1975); *Ledingham v. Blue Cross Plan for Hosp. Care of Hosp. Serv. Corp.*, 29 Ill. App. 3d 339, 330 N.E.2d 540 (1975); *United States Fidelity & Guar. Co. v. Peterson*, 540 P.2d 1070 (Nev. 1975); *United Servs. Auto. Ass'n v. Werley*, 526 P.2d 28 (Alas. 1974); *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); *Key Life Ins. Co. v. Mitchell*, 129 Ga. App. 192, 198 S.E.2d 919 (1973); *Matthews v. Travelers Ins. Co.*, 212 Kan. 292, 510 P.2d 1315 (1973).

94. *United States Fidelity & Guar. Co. v. Peterson*, 540 P.2d 1070, 1071 (Nev. 1975).

95. See text accompanying notes 29-32 *supra*.

96. 48 Cal. App. 3d 917, 939, 122 Cal. Rptr. 470, 486 (Ct. App. 1975). This may not always be the case. See text accompanying note 104 *infra*.

97. *Id.* at 939 n.14, 122 Cal. Rptr. at 486 n.14.

98. To require impact or presence in a zone of danger before damages for mental distress are allowed in breach of implied covenants of good faith cases makes little sense, since only under unusual circumstances would an insurer's breach result in impact or danger to the insured.

99. 48 Cal. App. 3d 917, 940, 122 Cal. Rptr. 470, 486 (Ct. App. 1975).

100. *Id.* at 943-44, 122 Cal. Rptr. at 488. The court noted in passing that an alternative to assuming the defense of its insured when the issue of coverage is unclear is a declaratory relief action to test its duty. If the insurer elects not to file a declaratory relief action but to treat the alleged title defect as illusory, the court concluded that the insurer must bear the risk of its decision, and may subsequently be found to have acted in bad faith. *Id.* at 942-43 nn.16 & 18, 122 Cal. Rptr. at 488 nn.16 & 18.

101. *Id.* at 923, 122 Cal. Rptr. at 476.

cover damages for emotional distress caused by failure of the title insurer to defend.¹⁰² Several problems, however, limit its usefulness. First, not all states read this covenant into insurance contracts.¹⁰³ Second, it is not clear at this point how future courts will deal with emotional distress damages awarded under this cause of action. It may be that barriers similar to the impact or zone of danger tests will be imposed to limit recovery of mental distress damages. For example, the California courts require "substantial damage," apart from the emotional distress, before recovery can be obtained.¹⁰⁴

III. THE NEED TO ALLOW RECOVERY FOR EMOTIONAL DISTRESS IN TITLE INSURANCE CASES

Most of the changes in the law governing the award of damages for emotional distress have resulted from the conflict created by the use of arbitrary rules, such as the impact and zone of danger rules, to eliminate vexatious and fictitious claims.¹⁰⁵ The mechanical application of these rules often creates inequitable results¹⁰⁶ and offends the principle that the law provides a remedy for every wrong. This is particularly true when the emotional distress arises from injury to a property interest. The conflict is illustrated clearly in the area of title insurance where, in most jurisdictions, the requirement of actual or threatened impact to the person precludes damages for emotional distress, even in cases where genuine emotional injury has occurred.¹⁰⁷

The special relationship between the title insurer and insured makes the risk of emotional distress foreseeable and should require compensation by the title insurer for emotional distress resulting from breach of the title insurer's duties to the policyholder. The typical title insurance policyholder is a homeowner who, in order to obtain financing for his home, was required by the mortgage company to buy a title insurance policy. This unsophisticated purchaser has no input into the contract he signs¹⁰⁸ and reasonably expects that title insurance will protect his investment from future title problems.¹⁰⁹ Loss of this most

102. See text accompanying notes 93-100 *supra*.

103. See note 93 *supra*.

104. 48 Cal. App. 3d 917, 944, 122 Cal. Rptr. 470, 489 (Ct. App. 1975).

105. See text accompanying notes 43-52 *supra*.

106. *Id.*

107. See text accompanying notes 53-59 *supra*.

108. See *Duty to Search*, *supra* note 1, at 1179.

109. Curtis, *supra* note 3, at 1.

important investment could reasonably be expected to create extreme emotional upheaval in his life. The title insurance company, on the other hand, represents an institution that, in many states, holds a virtual monopoly on the abstracting business.¹¹⁰ The general public depends upon these companies for accurate reports of the state of title.¹¹¹

Jarchow typifies the type of case that in most states would have no adequate remedy. In that case, the plaintiffs invested their life savings in a plan to build a small business.¹¹² They obtained the land along with a title insurance policy and were about to proceed when an adverse claimant clouded the title to the land.¹¹³ The title insurer refused to defend, leaving the plaintiffs with no choice but to clear the title themselves.¹¹⁴ The subsequent court action exhausted their savings, created mental stress as they strove to extricate themselves, and eventually resulted in a failure to achieve their goals.¹¹⁵ Had the title insurer defended, the plaintiffs' expectations at the time they bought the policy would have been fulfilled. They would have had no expense. In addition, return of their investment in the event that title to the land remained clouded would have been assured.

A better solution to the problems of damages for emotional distress would seem to be one suggested years ago by Dean Prosser and now accepted by several of the states, as illustrated by the cases cited earlier in this comment.¹¹⁶ The problem, according to Prosser, should be confronted and resolved by rules of proof rather than by imposition of limits on the negligence action itself.¹¹⁷ The growing competence of medical science in the field of psychic injuries has diminished the problems of proof in this area.¹¹⁸ Many authorities now feel that science can establish with reasonable medical certainty the existence and severity of psychic harm and that the case law involving damages for emotional distress should evolve to keep pace with the increased sophistication of psychiatry.¹¹⁹ Certainly reliance on general negligence

110. *Id.* at 20; Quiner, *supra* note 1, at 721.

111. *See* Curtis, *supra* note 3, at 20.

112. 48 Cal. App. 3d 917, 930-31, 122 Cal. Rptr. 470, 479-80 (Ct. App. 1975).

113. *Id.*

114. *Id.* at 927, 122 Cal. Rptr. at 478.

115. *Id.* at 927, 122 Cal. Rptr. at 479.

116. *See* text accompanying notes 76-91 *supra*.

117. W. PROSSER, *supra* note 30, § 54, at 328.

118. 63 GEO. L.J. 1179, 1184 (1975).

119. *See* W. PROSSER, *supra* note 30, § 12, at 50-51. *See also* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1253 (1971). For an excellent case which reviews these arguments, see *Rodrigues v. State*, 52 Hawaii 156, 472 P.2d 509 (1970).

principles would provide a more equitable solution for meritorious cases in all areas of the law, including title insurance, while still guarding against vexatious and fictitious claims. Further, the availability of a remedy for wrongful infliction of emotional distress would encourage title insurers to defend within the provisions of their policies.