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Recovering damages for emotional distress for breach of an insurance contract

A LIABILITY POLICY IS A CONTRACT THAT CONCERNS DIRECTLY THE COMFORT, HAPPINESS, OR PERSONAL WELFARE OF ONE OF THE PARTIES

In 2022, I wrote an article for Advocate magazine, "Rethinking Damages for Breach of an Insurance Contract" (Advocate, November 2022). Conducting research for the article, I stumbled across the following comment in The Rutter Group's Practice Guide for "Insurance Litigation": certain cases "suggest that emotional distress damages *may* be recoverable for *any* refusal to pay policy benefits. But the issue has not been extensively litigated or analyzed by the courts." (California Practice Guide: Insurance Litigation (The Rutter Group 2022), ¶ 13:26, at 13-7 (emphasis in original).)

I dug into the cases, and a fair reading of California case authority establishes that an insured may recover damages for emotional distress based solely on a breach of contract without proving that an insurance carrier acted unreasonably (in "bad faith") when it denied contract benefits or delayed in providing them. These cases also establish that if the insurance carrier has breached the contract, the insured need not plead or prove any physical injury to recover damages for emotional distress for breach of the insurance contract.

The authorities discussed in this paper are important for two reasons:

1. These authorities make it easier – not easy, but *easier* – to recover damages for emotional distress when an insured must sue the insurance carrier to recover contract benefits. To recover damages for emotional distress for breach of an insurance contract, an insured need prove only that the insurance carrier failed to provide contract benefits or delayed in providing them. The insured need not establish that the insurance carrier acted in bad faith, which means that it lacked "proper cause for its conduct." (CACI 2331.) The decisions discussed below allow an insured to recover damages for emotional distress even if the insurance carrier just made "an honest mistake" but did not necessarily act "unreasonably" or "without proper cause."
2. An insured can take advantage of the longer limitations period for a breach of contract claim (usually, but not always, four years) versus the shorter limitations period for a claim based on the breach of the implied covenant of good faith and fair dealing (typically two years) and still recover damages for emotional distress. (See, *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90.)

Now, the cases:

Chelini v. Nieri (1948) 32 Cal.2d 480

In *Chelini v. Nieri*, the plaintiff's mother died, and the plaintiff reached an oral agreement with a mortician to prepare his mother's body for burial. (*Chelini*, 32 Cal.2d. at 482.) The plaintiff "repeatedly informed defendant [the mortician] that he 'wished to have his mother's body preserved, because she had a horror . . . of bugs and water,' and defendant assured plaintiff that 'it would last almost forever.'" (*Ibid.*) According to the Court, the defendant "knew, at or about the time he agreed to preserve the body 'almost forever,' that plaintiff was highly preoccupied with the importance of such preservation and that at some indefinite future date plaintiff intended to move the casket and expected the body to be in such a state of preservation that defendant could place a ring and slippers on it." (*Id.* at 482-83.) After the plaintiff began to suspect that perhaps his mother's body had not been preserved as the mortician has promised, he insisted that the mortuary open his mother mother's casket. (*Id.* at 483.) When the casket was opened, the plaintiff saw that the flesh of his mother's body "had disintegrated and the skeleton was covered with insects." (*Id.* at 484.)

The plaintiff sued the mortician and alleged only one cause of action – for breach of contract. (*Id.* at 487.) The jury awarded the plaintiff $10,000 for general damages, and the California Supreme Court affirmed the award. (*Id.* at 481.) The jury's award was "predicated on defendant mortician's breach of a contract to preserve the body of plaintiff's mother and on plaintiff's physical illness, suffering and disability resulting from his discovery that because of such breach of contract the body became a 'rotted, decomposed and insect and worm infested mass.'" (*Ibid.*) The Court held that recovery of "so-called 'general damages'" – including damages for "suffering" – was "proper under the rule, laid down in *Westervelt v. McCullough* (1924) 68 Cal.App. 198, 208-09, and included in the instructions to the jury:

> Whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party, he may recover damages for physical suffering or illness proximately caused by its breach.

(*Chelini*, 32 Cal.2d at 481-82 (quotation marks omitted).)

The court in *Chelini* relied on the holding in *Westervelt* even though the plaintiff in *Westervelt* had sought to recover damages only for "physical suffering," not for emotional distress. *Chelini* establishes that a plaintiff may recover damages for emotional distress in a breach-of-contract action if the contract relates to "matters which concern directly the comfort, happiness, or personal welfare of one of the parties," or if the subject of the contract "is such as directly to affect or move the affection, self-esteem, or tender feelings of that party."

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Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425

Nineteen years later, in *Crisci v. Security Ins. Co*. (1967) 66 Cal.2d 425, the California Supreme Court relied on its holding in *Chelini* to affirm an award of damages for "mental suffering" in an action against an insurer for the insurer's refusal to settle a claim against the insured within policy limits. The Court held that the insured's recovery of such damages was appropriate even though the underlying contract was a liability policy.

> Recovery of damages for mental suffering in the instant case does not mean that in every case of breach of contract the injured party may recover such damages. Here the breach also constitutes a tort. 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 from 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 contracts which directly concern the comfort, happiness or personal esteem of one of the parties*.

(*Crisci*, 66 Cal.2d at 434 (citing *Chelini*, 32 Cal.2d at 482) (emphasis added).)

Crisci is the first reported instance of a court applying the holding and reasoning of *Chelini* to allow recovery of damages for emotional distress for the breach of an insurance contract.

State Farm Mut. Auto Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal.App.3d 508

Three years later, the court of appeals in *State Farm Mut. Auto Ins. Co. v. Allstate Ins. Co*. (1970) 9 Cal.App.3d 508, relied on *Chelini* and *Crisci* to affirm an award of $2,500 for "pain and distress" even though the only legal theory that the insured had alleged was a cause of action for breach of contract. The appellate court rejected Allstate's argument that damages for "pain and distress" were not recoverable in an action for breach of contract:

> The theoretical distinction [between contract damages and tort damages] is of no moment at this point because the $2,500 award was proper even under a breach of contract theory. 'Whenever the terms of a contract relate to matters which concern directly the comfort, happiness, or personal welfare of one of the parties . . . he may recover damages for physical suffering . . . caused by its breach.' . . . A liability insurance policy is such a contract.

(9 Cal.App.3d at 527-28 (quoting *Chelini*, 32 Cal.2d at 482 and citing *Crisci*, 66 Cal.2d at 434) (ellipses in original).)

Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809

In *Egan v. Mutual of Omaha Ins. Co*. (1979) 24 Cal.3d 809, the California Supreme Court cited *Crisci* and extended its reasoning to an insured seeking to recover under a disability policy. The issue in *Egan* was whether an insurance carrier could be held liable for punitive damages if it acted unreasonably or without proper cause. (24 Cal.3d at 819-20.) But the Court's reasoning in *Egan* reinforces the idea that the purpose of some contracts is "peace of mind and security," and that the recoverable damages for the breach of these contracts should be broader than the typical damages for breach of a contract:

> The insured in a contract like the one before us does not seek to obtain a commercial advantage by purchasing the policy – rather, he seeks protection against calamity. As insurers are well aware, the major motivation for obtaining disability insurance is to provide funds during periods when the ordinary source of the insured's income – his earnings – has stopped. The purchase of such insurance provides peace of mind and security in the event the insured is unable to work.

(*Egan*, 24 Cal.3d at 819 (citing *Crisci*, 66 Cal.2d at 434).)

Wynn v. Monterey Club (1980) 111 Cal.App.3d 789

Wynn is not an insurance case, but it's worth reading nevertheless because of the court's succinct discussion of the "erosion" of the "traditional rule" that "damages are not recoverable for mental suffering resulting from a breach of contract." (*Wynn*, 111 Cal.App.3d at 800-801.) It's a bonus that the facts in *Wynn* read like an episode in a telenovela.

The plaintiff in *Wynn v. Monterey Club*, Robert Wynn, was a man whose wife was a "compulsive gambler." In "the latter part of 1973," Wynn's wife "suffered heavy losses" while gambling at two "card clubs" in Gardena. While Wynn was not legally responsible for his wife's gambling debts, his wife's "gambling problem" placed "a severe strain on their marriage."

Wynn called Lochhead, "one of the general partners" who operated the two clubs where Wynn's wife had "suffered heavy losses." Wynn and Lochhead reached an agreement: Wynn would pay his wife's gambling debts. In exchange, Lochhead and his partners would deny Wynn's wife access to their clubs. They also would deny her any further check-cashing privileges. Lochhead confirmed their agreement in a follow-up letter to Wynn.

Over the following year, Wynn paid his wife's debts to the clubs. Moreover, during this year and the following year, at least as far as Wynn knew, his wife refrained from gambling.

But in May 1977, Wynn learned that his wife was again gambling at Lochhead's clubs, and the clubs were cashing her checks. Wynn's wife had lost approximately $30,000 and had begun to borrow money from friends to cover her losses.

According to Wynn, his wife's return to gambling destroyed their marriage. Wynn filed for divorce from his wife. He also sued Lochhead's clubs for breach of contract. In his complaint against the card clubs, Wynn alleged that "by deliberately or negligently breaching their contract," these clubs had "caused

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disruption of the marriage, which resulted in [Wynn] suffering physical and emotional distress compensable by way of general and punitive damages."

The clubs moved for summary judgment. The trial court concluded that Wynn's contract with the clubs was illegal and unenforceable and granted the clubs' motion on condition that defendants refund to Wynn the $1,750 that he had paid, plus interest.

Wynn appealed, and the appellate court reversed. The court held that Wynn's contract with the clubs – to deny Wynn's wife access to the clubs and to refuse to cash any further checks from her – was neither illegal nor contrary to public policy.

The appellate court then went on to address another question, one which neither Wynn nor the defendants had addressed: whether Wynn could recover damages for his emotional distress based on his claim that the defendants had breached their contract with him. The court concluded that he could:

> As for compensating [Wynn] for physical or emotional harm it is clear that, under the circumstances, such harm was reasonably foreseeable and was, in contemplation of the contracting parties, likely to result from a breach of the contract. Defendants were well aware of the wife's propensities and the impact that her gambling was having on [Wynn] personally and the marriage in particular. [Defendants] well knew that [Wynn's] motivation in entering into the contract was to preserve the tranquility of [his] marriage and [his] emotional well-being.

(*Id*. at 799-800.)

The *Wynn* court then goes on to discuss the "erosion" of the traditional rule – that "damages are not recoverable for mental suffering resulting from a breach of contract." The court surveys the cases that "erode" the "traditional rule," beginning with *Westervelt v. McCullough* (1923) 68 Cal.App. 198 (see above), continuing through *Chelini* (see above), then *Windeler v. Scheers Jewelers* (1970) 8 Cal.App.3d 844 (approving an award for physical injury caused by the breach of a bailment contract involving jewelry "with great sentimental value"), then *Crisci* (see above). The court ends its survey by citing *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, in which the California Supreme Court, in a tort action, "discarded the rule that mental suffering was compensable only when accompanied by physical injury." (*Wynn*, 111 Cal. App.3d at 800.)

"Against the background of such persuasive precedent," the *Wynn* court wrote, "we have no difficulty in concluding that the only limitation on [Wynn's] recovery in this case is the language in Civil Code section 3300 which provides:

> For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for *all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom*.

(*Wynn*, 111 Cal.App.3d at 801 (emphasis in original).)

The *Wynn* court continued:

> In the case at bench, our analysis is that, for purposes of determining the propriety of a summary judgment, the contract was a lawful contract which by its nature put the defendants on notice that a breach thereof would result in emotional and mental suffering by the plaintiff as well as other forms of compensable damage. In light of that conclusion it is patent that the defendants in moving for summary judgment did not negate the presence of triable issues of fact.

(*Wynn*, 111 Cal.App.3d at 801.) The court reversed the order granting the defendants' motion for summary judgment and remanded the case to the trial court. (*Ibid*.)

Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal.App.3d 90

In *Frazier v. Metropolitan Life Ins. Co*. (1985) 169 Cal.App.3d 90, the court of appeals affirmed an award of $150,000 for emotional distress for the beneficiary of a life insurance policy even though the beneficiary had elected to proceed on a contract theory, not a tort theory. (*Id*. at 105 ["plaintiff is entitled to seek damages for emotional distress despite an election to proceed on a contract theory"].) The court also held that the four-year statute of limitations applied to the plaintiff's breach-of-contract claim. (*Id*. at 102-103.)

Frazier is the latest case I have found in which a court addresses recovery of damages for emotional distress for breach of an insurance contract.

Two later cases to consider even though they're not insurance cases

In *Erlich v. Menezes* (1999) 21 Cal.4th 543, the California Supreme Court considered whether damages for emotional distress are available for breach of a contract for the construction of a "dream house." Holding that the plaintiffs – the disgruntled homeowners – could not recover damages for emotional distress based on their general contractor's breach of the contract, the court explained:

> [D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California. Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that series emotional disturbance was a particularly likely result.

(*Erlich*, 21 Cal.4th at 558 (citations omitted).)

The court noted, however, that "when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach

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of the contract may give rise to damages for mental suffering or emotional distress." (*Erlich*, 21 Cal.4th at 559 [collecting cases in which California courts have upheld recovery of emotional distress damages based on breach-of-contract claims].)

In *Levy v. Only Cremations for Pets, Inc.* (2020) 57 Cal.App.4th 203, the appellate court relied on *Erlich* in holding that the breach of a contract for private cremation of a pet could support a recovery of damages for emotional distress:

> That exception [set forth in *Erlich*] applies here. The sole purpose of a private cremation of a pet is the emotional tranquility of the owner. There is no economic benefit to a private cremation – to the contrary, it is more expensive than a group cremation. That additional cost is incurred solely for an emotional benefit. That fact is reflected in defendant's alleged marketing material. According to the complaint, defendant advertised the emotional benefit of a private cremation, professing that "our pets are as much a part of the family as any human, deserving the same equal, loving treatment." Its Web site described one of its goals was "to provide [customers] with a dignified and proper farewell to [their] beloved pet." Plainly, this is an appeal to the emotional satisfaction of potential customers. Accordingly, to the extent that plaintiffs can allege they are third party beneficiaries of the contract between the veterinarian and defendant, emotional distress damages are available.

(*Levy*, 57 Cal.App.4th at 215.)

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