IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 63,739



METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

ERNEST D. McCARSON, SR., etc., et al.,

Respondent.
_____/

# RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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## ISSUE

## BREACH OF CONTRACT

We do not contend that simple breach of contract can be the basis for the recovery in the present case. Where there is more than simple breach of contract, however, such as bad faith, Florida and the vast majority of other states which have considered the issue have held that there could be a recovery under these facts. These cases will be discussed under the second issue, which is:

## BAD FAITH ACTIONS AS BASIS FOR WRONGFUL DEATH RECOVERY.

This argument is limited to bad faith cases involving the refusal of an insurer to pay first party benefits, not a bad faith refusal to settle, a cause of action which is firmly established in Florida.

In World Insurance Company v. Wright, 308 So.2d 612 (Fla. 1st DCA 1975), a disability insurer was in bad faith in refusing to pay benefits. The First District affirmed an award for the benefits due under the policy and $40,000 as compensatory damages for intentional infliction of emotional distress, stating on page 612:

> It is well-settled that damages for emotional or mental distress may be recovered from one whose conduct was tortious despite

> the fact that the conduct also involves a breach of contract. Miller v. Mutual of Omaha Insurance Company, 235 So.2d 33 (Fla. App. 1st, 1970). Here the appellant's threatened and actual bad faith (including attempts to "buy up" the policy) justified an action for damages for the intentional infliction of mental distress, and we think the testimony concerning appellee's ordeal was sufficient to support the verdict of $40,000.00....

In Escambia Treating Company v. Aetna, 421 F.Supp. 1367 (N.D. Fla. 1976), the court stated:

> ...this court concludes that under Florida law defendant has the implied duty under its contract of insurance to proceed in good faith and deal fairly with its insured. The insurer has liability, sounding in tort, with right of recovery of damages when, in violation of that duty, it unreasonably and in bad faith withholds payment to its insured.
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> In summary, the court concludes that Florida law recognizes an implied duty on the part of an insurance company to deal fairly and in good faith with its insured. The duty arises out of the insurance contract, and an unreasonable, bad faith refusal to pay the valid claim of the insured is a breach of that duty and imposes liability sounding in tort. The plaintiff in such an action may recover compensatory, and in the proper case punitive, damages in accordance with existing Florida law.

In Life Investors Insurance Company of America v. Johnson, 422 So.2d 32 (Fla. 4th DCA 1982), plaintiff purchased a credit disability insurance policy along with her automobile and when she became disabled the company did

not pay resulting in her car being repossessed. She brought suit and, as the insurer in the present case contends, the defendant argued she could only recover what was owed under the contract. The Fourth District disagreed, stating on page 34:

> ...Adverting to the Hadley v. Baxendale rule that a breach of contract may give rise to damages which were in contemplation of the parties at the inception of the contract, it appears to us that if the jury finds that appellee breached the contract, Johnson is entitled to recover more than the pecuniary loss involved in the balance of the payments due under the policy. That conclusion follows the fact that Johnson purchased the car and the disability insurance policy at the car dealership. The purpose of acquiring the policy was to assure satisfaction of her car payments in the event of her disability. Thus, it follows that any damages accruing to Johnson as a result of repossession of her car for nonpayment of the monthly payments due to her disability were contemplated by the parties. Those damages would be the value of the automobile or the balance of payments due under the policy, whichever is greater, together with the loss of use of the car from the date of the repossession until the jury verdict is rendered, and interest thereon....

Certainly if an insurer's failure to pay benefits results in the loss of an automobile for which compensation is allowed, the willful refusal to pay resulting in loss of a life should also be compensable.

Florida is thus presently considered one of the states which does recognize a cause of action where the insurer has

been guilty of a bad faith refusal to pay a first party claim. This Court has phrased the issue as involving a bad faith action as a basis for wrongful death recovery. Our research does not reveal any cases in which it was alleged a wrongful death resulted from the conduct of the insurer. The issue is whether consequential damages other than the amount due on the policy can be recovered where the insurer is in bad faith in refusing to pay a first party claim. The cases from other jurisdictions generally make no distinction between the types of damages which can result from this type of conduct, permitting recovery for interruption or loss of business, defending lawsuits brought by creditors, medical expenses and damages resulting from mental distress.

The overwhelming majority of jurisdictions which have considered the issue in recent years have recognized the cause of action. The leading case is Gruenberg v. Aetna, 510 P.2d 1032, 9 Cal.3d 566, 108 Cal.Rptr. 480 (1973), in which the insurer was in bad faith in refusing to pay a fire insurance claim. In quoting from one of its previous decisions in Richardson v. Employers Liab. Assur. Corp., 102 Cal.Rptr. 547, 25 Cal.App.3d 232 (1972), the Gruenberg court stated on page 1037:

> ...Here, Employers deliberately, willfully and in bad faith withheld payment of the Richardson claim months after it knew the claim to be completely valid; it forced an

> arbitration hearing on a claim against which it already knew that it had no defense; even after the award was made, it instructed its local office to attempt 'to make the best possible settlement,' and forced plaintiffs to resort to litigation to have the award judicially confirmed. This conduct toward its own insured was unconscionable, and constituted a tortious breach of contract....The duty violated--that of dealing fairly and in good faith with the other party to a contract of insurance--is a duty imposed by law, not one arising from the terms of the contract itself. In other words, this duty of dealing fairly and in good faith is nonconsensual in origin rather than consensual. Breach of this duty if a tort. (Citations omitted)
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> ...We think that, similarly, the implied-in-law duty of good faith and fair dealing imposes upon a disability insurer a duty not to threaten to withhold or actually withhold payments, maliciously and without probable cause, for the purpose of injuring its insured by depriving him of the benefits of the policy....
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> It is manifest that a common legal principle underlies all of the foregoing decisions; namely, that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.

In Volume 16A, Appleton, Insurance Law & Practice, § 8878, page 417, it is stated:

> ...A man without a car must incur extra transportation expenses which are not satisfied by the mere replacement of that car

> some six months later. He may sustain a large loss of profits where a commercial vehicle is involved. And to use an extreme example, an annuity or disability insurer may be able to terminate its liability by delaying payments needed for medical treatment to keep the insured alive. Likewise, unless prevented by the courts, it is to the interest of a disability insurer to engage in protracted and unwarranted litigation creating undue stress which may well precipitate the insured's death. Accordingly, the insurer should be held to a duty to pay such proceeds promptly in accord with the intention of the parties at the time of the issuance of the contract.
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> One of the most frequent considerations in procuring life insurance is to ensure the continued economic and mental welfare of the beneficiaries on the death of the insured. And, in his lifetime, any insured expects, and has a reasonable right to expect, that a valid claim will be paid.
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> The majority of states, accordingly, have adopted the doctrine examined in California -- that is, an insurer in its relationship to its policyholders and to the public owes a duty of good faith and fair dealing. An insurer thus owes to its insured an implied-in-law duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of his policy.
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> The better rule is that the obligation of an insurer to its insured upon the proper presentation of a valid claim under a disability policy is not limited to payment of money only. Rather, it requires that losses be paid promptly, upon the receipt of proper proofs of loss. And when it fails to do so, it is foreseeable that adverse consequences may follow. (Emphasis added) (Footnotes omitted)

The "extreme example" of Appleton is exactly what occurred in the present case. There was proof that as a

result of the insurer's wrongful refusal to pay benefits the insured was unable to provide his wife with in home nursing service, resulting in her being strapped into a bed in a nursing home where she died shortly thereafter. Medical testimony showed a direct causal relationship.

In Couch on Insurance 2d, § 58:7, it is stated on page 266:

> Where the insurer unreasonably fails to pay its insured amounts due under the policy, it may become liable for bad faith damages. The insurer breaches its covenant of good faith and fair dealing implied in law when it refuses to compensate its insured without just cause and as such a cause of action in tort may arise....

In Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Insurance Co., 279 N.W.2d 638 (N.D. 1979), the court recognized that North Dakota had the same general law Florida has, i.e., punitive damages are not recoverable for breach of contract unless there is an independent tort, but adopted the rationale of Gruenberg, supra, and held that the insured had a cause of action for a bad faith refusal to pay an embezzlement claim, resulting in other economic losses.

In Grand Sheet Metal Products Co. v. Protection Mutual Insurance Co., 34 Conn.Supp. 46, 375 A.2d 428 (1977), the Court adopted Gruenberg, supra, and held consequential

damages could be recovered for bad faith refusal to pay a first party claim.

In Bibeault v. Hanover Insurance Co., 417 A.2d 313 (R.I. 1980), it was held that economic loss, emotional distress and punitive damages were all recoverable, the Court stating on page 319:

> The members of this court are of the opinion that an insurer doing business in Rhode Island is obligated to act in good faith in its relationship with its policyholders. A violation of this duty will give rise to an independent claim in tort in which, as in the present controversy, there has been a specific finding that the insurer has in bad faith refused to pay the claims due an insured. Recognition of this tort in Rhode Island does not, however, imply that whenever an insurance company loses a dispute in court regarding the validity of a claim, it breaches the implied-in-law duty of good faith. If a claim is 'fairly debatable,' no liability in tort will arise.
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> The duty of an insurer to deal fairly and in good faith with an insured is implied by law. Since violation of this duty sounds in contract as well as in tort, the insured may obtain consequential damages for economic loss and emotional distress and, when appropriate, punitive damages. Christian v. American Home Assurance Co., 577 P.2d 899 (Okl. 1977). In regard to punitive damages, we would point out that the intent necessary to establish the tort of bad faith is not equivalent to the intent that would sustain an award for punitive damages. Punitive damages may only be awarded when an insurer has acted with malice, wantonness, or wilfulness....

In Anderson v. Continental Ins. Co., 271 NW2d 368 (Wis. 1978), the Wisconsin Supreme Court adopted Gruenberg and held that the bad faith refusal to pay a claim from smoke damage was actionable.

In Sweet v. Grange Mutual Casualty Co., 364 N.E.2d 38 (Ohio 1975), the facts were very similar to the present case in that the insurer was guilty of a bad faith refusal to pay, knowing that the plaintiff was totally disabled and had a special need for payment of his claim. It was held that consequential damages were recoverable.

Likewise in Egan v. Mutual of Omaha Insurance Co., 24 Cal.3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979), the insurer unreasonably refused to pay a disability claim, with knowledge that the insured had a disabled wife and young child, and consequential damages were held recoverable.

In Gulf Atlantic Life Insurance Co. v. Barnes, 405 So.2d 916 (Ala. 1981), there was an unreasonable refusal to pay a life insurance claim and it was held the insured could recover damages for economic losses and mental distress. The Court cited the Florida case of Escambia, supra, as authority.

In Berry v. United of Omaha, 719 F.2d 1127 (5th Cir. 1983), it was recognized that there was a cause of action for bad faith refusal to pay first party benefits in Alabama.

In Nobel v. National American Life Insurance, 128 Ariz. 188, 624 P.2d 866 (1981), an insurer refused to pay hospital and surgery benefits and the court held "... when insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort."

In Ledingham v. Blue Cross Plan, 330 N.E.2d 540 (Ill. 1975) insurer was held liable for compensatory damages for emotional distress as a result of its wrongful refusal to pay benefits on a health insurance policy.

In USF&G v. Peterson, 540 P.2d 1070 (Nev. 1975), the insurer wrongfully refused to pay for damages caused in construction and it was held that the insured had a cause of action to recover for loss of business and credit.

In Chavez v. Chenoweth, 553 P.2d 703 (N.M. 1976), it was held that the insurer could be liable for compensatory and punitive damages as a result of its bad faith refusal to pay medical expenses.

In Nichols v. State Farm, 306 SE2d 616 (S.C. 1983), the Court adopted Gruenberg stating that this was now the law in 25 states. Our research reveals the following cases from jurisdictions other than those cited above, which hold that the bad faith refusal of an insurer to pay a first party claim results in the insured being able to recover consequential damages over and above those due under the policy including economic losses of all types and/or damages for infliction of emotional distress: Green v. State Farm, 667 F.2d 22 (9th Cir. 1981); Rodgers v. Pennsylvania Life Ins. Co., 539 F. Supp. 879 (Iowa 1982); Gorab v. Equity General Agents, Inc., 661 P.2d 1196 (Col. 1983); Dailey v. Integon General Ins. Corp., 291 S.E.2d 331 (N.C. 1982); Baker v. American States Insurance Co., ___Ind.App.____, 428 N.E.2d 1342 (1981); Hayes v. Aetna Fire Underwriters, 609 P.2d 257 (Mont. 1980); Linscott v. Rainer National Life Insurance Co., 100 Idaho 854, 606 P.2d 958 (1980); Lawton v. Great Southwest Fire Ins. Co., 392 A.2d 576 (N.H. 1975); Gibson v. National Ben Franklin Insurance Co., 387 A.2d 220 (Me. 1978); Christian v. American Home Assurance Co., 577 P.2d 899 (Okla. 1977); Ausden v. Grinnel Mutual Reinsurance Co., 203 N.W.2d 252 (Iowa 1972).

During the last 10 years almost every single court in this country which has considered the question has held that there could be a recovery under the present facts. Florida

is one of those states by virtue of decisions of courts other than this one, and it is respectfully submitted that this court should follow those decisions.

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