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# DAMAGES ASSESSED AGAINST INSURERS FOR WRONGFUL FAILURE TO PAY

## INTRODUCTION

Protection of the individual insurance claimant from delay and oppression by the insurance company from which he seeks payment has been the concern of courts and legislatures.<sup>1</sup> Where the insured brings an action against his insurer for wrongful refusal to pay a just claim,<sup>2</sup> the question arises as to how far the courts can proceed at common law or under statute in the direction of awarding compensatory and punitive damages for a breach of contract. On the one hand, the courts seek to place the victim of the breach in that position he would have occupied had the breach not occurred. Conversely, there is a recognition that beyond a certain point the ability of insurance companies to determine which claims are due and payable may be unfairly inhibited.<sup>3</sup> Attacking the problem directly, several state legislatures enacted "penalty statutes" which allow punitive damages and reasonable attorney's fees to be awarded in breach of contract actions where the insurer is found to have acted in "bad faith."<sup>4</sup>

## THE COMMON LAW

Where penalty statutes do not apply, the common law rules of *New Orleans Ins. Assoc. v. Piaggio*<sup>5</sup> and *Hadley v. Baxendale*<sup>6</sup> control. Because these rules are strictly applied and have a tendency to allow damages only within rather clearly defined limits<sup>7</sup> they apparently

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1. 48 HARV. L. REV. 319 (1934).

2. This problem is to be distinguished from those which arise out of duties other than to pay the insured a money claim. See *Lowe v. Turpie*, 147 Ind. 652, 44 N.E. 25 (1896); *Banewur v. Levenson*, 171 Mass. 1, 50 N.E. 10 (1898); *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Messenger*, 181 Md. 295, 29 A.2d 653 (1943).

3. 48 HARV. L. REV. 319 (1934).

4. Such statutes have been adopted in Arkansas, Florida, Georgia, Idaho, Illinois, Kansas, Louisiana, Missouri, Nebraska, Oregon, Tennessee, and Texas.

5. 83 U.S. (16 Wall.) 378 (1872).

6. 156 Eng. Rep. 145 (Ex. 1854); See cases cited under 15 AM. JUR. *Damages* § 9 (1938).

7. First, in the ordinary situation only the amount stated in the policy plus legal interest could be recovered. *New Orleans Ins. Ass'n v. Piaggio*, 83 U.S. (16 Wall.) 378 (1872). Second, in extraordinary cases in which additional injury was sustained by the plaintiff, consequential damages could be awarded if the damage could be shown to

favor the insurer. Nevertheless, both rules are based on a common law theory which manifests that damages for breach of contract should be certain and clearly related to the rights and duties embodied in the contract.<sup>8</sup> Neither rule allows exemplary or "punitive" damages for breach of contract.<sup>9</sup>

In recognizing the apparent need for certainty in the law, courts have been reluctant to extend liability beyond the terms of the contract unless the damages asked are clearly the proximate result of the breach.<sup>10</sup> In actions on insurance contracts, where the obligation is to pay money only, the rule of *Piaggio* is generally controlling, and plaintiff's recovery is limited to the amount due plus lawful interest.<sup>11</sup> Where the insurer is under a duty other than to pay money, the courts will limit the measure of damages to those reasonably foreseeable as resulting from breach of the specific duty.<sup>12</sup> Where liability is determined by verdict of the court, as in "excess judgment" actions, there is no question as to the measure of damages.<sup>13</sup> Damages felt to be "speculative" or "too remote" have been disallowed under the rule of *Hadley v. Baxendale*.<sup>14</sup> In this regard, there is usually a distinction drawn between a contract to pay money and a contract to lend money, because in the latter instance there is more often a justification for the award of consequential damages.<sup>15</sup> Under either rule, the motivation of the breaching party is irrelevant and wilfulness or malice alleged will not aggravate the case for damages.<sup>16</sup>

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have been such "as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854).

8. 5 S. WILLISTON ON CONTRACTS § 1410 (2d ed. 1936).

9. *Smith v. Piper*, 423 S.W.2d 22 (Mo. Ct. App. 1967); *White v. Benkowski*, 37 Wis.2d 285, 155 N.W.2d 74 (1967); 5 A. CORBIN, CONTRACTS § 1077 (1951).

10. *Savings Bank v. Ashbury*, 117 Cal. 96, 48 P. 1081 (1897); 15 AM. JUR. *Damages* 166 (1938).

11. *New Orleans Ins. Ass'n v. Piaggio*, 83 U.S. (16 Wall) 378, 386-387 (1872).

12. *Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Messenger*, 181 Md. 295, 29 A.2d 653 (1943); *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854); McCormick, *The Contemplation Rule as a Limitation on Damages for Breach of Contract*, 19 MINN. L. REV. 497 (1934); RESTATEMENT OF CONTRACTS 330 (1932).

13. *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968).

14. 156 Eng. Rep. 145 (Ex. 1854).

15. This distinction ordinarily occurs when there is a specific purpose for the loan understood by both parties at the time of contracting. 5 A. CORBIN, CONTRACTS § 1078 (1951).

16. *Chelini v. Nieri*, 32 Cal.2d 480, 196 P.2d 915 (1948).

In the absence of statute, it appears that an insured who brings an action against his insurer for wrongful refusal to pay a money claim is not only faced with the disadvantage of what is normally a substantial disparity between his own legal and financial resources and those of his corporate adversary,<sup>17</sup> but also with the fact that his loss will be measured in terms of a relatively narrow scope of damages. Where recovery of the policy amount alone will not compensate him for injuries which occurred as a result of his not receiving the money, plaintiff must attempt to prove that such injuries are not remote or speculative, but are the proximate result of insurer's delay or absolute refusal to pay, or were within the contemplation of the parties at the time of contracting.<sup>18</sup> In view of these disadvantages, it is not unusual that two facts often preclude litigation: (1) the claimant finds that the cost of suit would exhaust any recovery he might have; and (2) he is unable to sustain the burden of proof required to show "proximate result" or "reasonable contemplation."<sup>19</sup>

#### THE PENALTY STATUTES

The legislative response to this problem has been the "penalty" statute.<sup>20</sup> Where penalty statutes have been enacted, courts have held on the one extreme that the insurer is guilty of bad faith under the statute if it litigates and loses.<sup>21</sup> Other courts do not adhere to such a strict view, rather holding that the fact of litigation is only evidence of bad faith where no open question of fact or law is presented.<sup>22</sup> Nevertheless, at least one court in a "penalty" state has felt compelled to speak out in defense of the insurer's right to litigate a disputed claim, thus indicating an awareness that such statutes may operate unfairly

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17. 48 HARV. L. REV. 319 (1934).

18. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854); *Taylor v. Colorado State Bank*, — Colo. —, 440 P.2d 772 (1968); *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968).

19. *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968).

20. *E.g.*, TEX. CIV. STAT., INS. CODE §§ 3.62, 3.62-1 (1963). See also *First Nat'l Life Ins. Co. v. Vittow*, 323 S.W.2d 313 (Tex. Civ. App. 1959). The same result (with the possibility of heavier damages) can be achieved in Texas at common law. *Export Ins. Co. v. Herrera*, 426 S.W.2d 895 (Tex. Civ. App. 1968).

21. *Isaac Bell, Inc. v. Security Ins. Co.*, 175 La. 599, 143 So. 705 (1932); *First Nat'l Life Ins. Co. v. Vittow*, 323 S.W.2d 313 (Tex. Civ. App. 1959).

22. *Phoenix Assurance Co. v. Appleton*, 296 F.2d 787 (8th Cir. 1961); *Butler v. Equitable Life Assur. Soc'y of the United States*, 233 Mo. App. 94, 93 S.W.2d 1019 (1936).

and repressively against the insurance company.<sup>23</sup> Under these statutes, the insured is protected by a provision that the company must make payment within a certain period of time, such as sixty days.<sup>24</sup> Moreover, so the insured will not find the costs of suit prohibitive, the statutes generally provide for an award of reasonable attorney's fees.<sup>25</sup>

The total effect of the statutes seems varied. Although the immediate result of a penalty statute is an increase in litigation, a decrease is soon evidenced because the companies tend to settle disputed claims more readily.<sup>26</sup> Thus, claims practice must of necessity be well-regulated, and companies must be more careful in the handling of the policyholder within the state.<sup>27</sup>

In changing the common law rule to allow punitive damages for breach of contract, the statutes have a dual effect. First, they increase the company's risk of loss potential on a given policy and thereby cause a more careful company evaluation of the claim in respect to possible litigation. (As noted previously the tendency is to settle claims more readily.) Second, the statute provides an upper limit to the amount of damages which can be assessed as punitive, thereby inhibiting possible jury prejudice against corporations.<sup>28</sup> But in spite of the fact that the penalty legislation has the extremely desirable feature of limiting punitive damages, the insurance industry has resisted the passage of such statutes whenever possible,<sup>29</sup> apparently on the theory that the common law is more favorable to the insurer.<sup>30</sup>

#### SOME DEVELOPMENTS IN THE COMMON LAW

While it may have been true in the past that the common law favored the insurer, there are indications that this may no longer be the case. Judicial handling of the problem has centered on the nature of the action, with the chief difficulty being the rigidity of the gov-

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23. *Butler v. Equitable Life Assur. Soc'y of the United States*, 233 Mo. App. 94, 93 S.W.2d 1019 (1936).

24. *E.g.*, TEX. CIV. STAT., INS. CODE § 3.62-1 (1963).

25. *E.g.*, TEX. CIV. STAT., INS. CODE § 3.62 (1963).

26. Smith, *Penalties, Attorney's Fees and Punitive Damages as a Factor in Certain Claims Litigation* (October, 1963) (Unpublished article by R.W. Smith, Vice President and Counsel, Union Mutual Life Insurance Company, Portland, Maine.)

27. *Id.*

28. *Id.*

29. *Id.*

30. *But see* *Export Ins. Co. v. Herrera*, 426 S.W.2d 895 (Tex. Civ. App. 1968).

erning rules.<sup>31</sup> These rules are particularly vexing where plaintiff's grievance has all the necessary elements of two different valid causes of action, only one of which may come before the court. Thus, the strict application of those rules in combination with the restrictive effect of the common law forms of action has in many cases inhibited plaintiff's attempts to recover while insulating the insurer from greater liability.<sup>32</sup> However, the ability to join causes of action in tort and contract where they arise out of the same transaction under the codes<sup>33</sup> or under the Federal Rules of Civil Procedure<sup>34</sup> has made it possible for a plaintiff, under a favorable fact situation, to plead essentially the same facts in a cause of action in contract and a cause of action in tort.<sup>35</sup> As the plaintiff may allege both causes and may recover in both, the full range of damage is open to him—actual damage in the amount of the policy, consequential damages for the breach, where such can be proved, and punitive damages for the tort (usually fraud), where alleged and proved.<sup>36</sup>

Indications of how the law in this area may develop arise from an examination of the South Carolina "doctrine" of fraudulent breach of contract<sup>37</sup> coupled with a recognition of recent developments in the law of California.

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31. Tight adherence to the measure of damages of *New Orleans Ins. Ass'n v. Piaggio*, 83 U.S. (16 Wall.) 378 (1872), and *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854), combined with the restrictive and channelling effect of the forms of action and rules of common law pleading (particularly the doctrine of election) to make a breach of contract action which was accompanied with fraudulent overtones strictly a contract action. *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922). This would then limit damages to "actual" and in unusual cases "consequential." As time went on, however, courts have recognized that in certain cases contract and tort ought not to be separated because although they arise out of the same facts, different rights and duties are sought to be protected in each. *E.g.*, *Felder v. Great Am. Ins. Co.*; 260 F. Supp. 575 (C.D. S.C. 1966).

32. *Colvin v. McCormick Cotton Oil Co.*, 66 S.C. 61, 44 S.E. 380 (1903); *Carpenter v. Moore*, 51 Wash.2d 795, 322 P.2d 125 (1958); *see cases cited under 1 AM. JUR. ACTIONS* § 50 (1936); 1 *C.J.S. ACTIONS* § 44 (1936). *Compare Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922) *with Meeker v. Shafraneck*, 112 Ohio App. 320, 176 N.E.2d 293 (1960).

33. *Compare Haigler v. Donnelly*, 18 Cal.App.2d 674, 117 P.2d 331 (1941) *with Export Ins. Co. v. Herrera*, 426 S.W.2d (Tex. Civ. App. 1968).

34. *FED. R. CIV. P.* 7-12.

35. *Haigler v. Donnelly*, 18 Cal.App.2d 674, 117 P.2d 331 (1941); *Export Ins. Co. v. Herrera*, 426 S.W.2d 895 (Tex. Civ. App. 1968).

36. *Export Ins. Co. v. Herrera*, 426 S.W.2d 895 (Tex. Civ. App. 1968).

37. *Felder v. Great Am. Ins. Co.*, 260 F. Supp. 575 (C.D. S.C. 1966); *Blackmon v. United Ins. Co.*, 233 S.C. 424, 105 S.E.2d 521 (1958); *Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904).

## DOCTRINE OF "FRAUDULENT BREACH": SOUTH CAROLINA

Although considered an anomaly by some,<sup>38</sup> the doctrine of fraudulent breach of contract remains the law of South Carolina. This theory does not diverge from the general rule in states allowing joinder and in the federal courts which allows recovery in one action under one fact situation for breach of contract and for tort, where the tort arises out of a duty imposed by law brought on by the contract relation.<sup>39</sup> Analysis of the early decisions upon which the doctrine is based does not support the contention that punitive damages have ever been awarded in that state purely for breach of contract.<sup>40</sup> In the often cited case of *Rose and Rogers v. John S. Beatie*,<sup>41</sup> in which the "fraudulent breach" theory originated, it is apparent that the court was struggling to overcome the restrictions of the common law forms of action as it was faced with an overriding political and commercial necessity to find liability and fully compensate the injured parties.<sup>42</sup> Even in the face of such compulsion,<sup>43</sup> the court did not go beyond awarding a measure of damages well within the scope of *Hadley v. Baxendale*.<sup>44</sup> The rationale was that the parties should be placed in that position which they would have occupied had there been no breach.<sup>45</sup> Although the court mentioned punitive damages, none were awarded.<sup>46</sup>

However, in *Welborn v. Dixon*,<sup>47</sup> a majority of the court felt that *Rose* had in fact established the precedent that punitive damages could be awarded in a breach of contract action where the breach was accompanied by fraud.<sup>48</sup> But the dissent on that issue is compelling, and

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38. Smith, *supra* note 26.

39. *Felder v. Great Am. Ins. Co.*, 260 F. Supp. 575 (C.D. S.C. 1966).

40. Punitive damages are not awarded in absence of fraud alleged and proved. *Givens v. North Augusta Elec. & Improvement Co.*, 91 S.C. 417, 74 S.E. 1067 (1912).

41. Compare *Rose v. Beatie*, 2 Nott & McCord 538, 5 S.C. 216 (1820) with *Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904) and *Export Ins. Co. v. Herrera*, 426 S.W.2d 895 (Tex. Civ. App. 1968); see *Reichert v. General Ins. Co. of America*, — Cal.2d —, 428 P.2d 860, 59 Cal. Rptr. 724 (1967).

42. *Rose v. Beatie*, 2 Nott & McCord 538, 541-542, 5 S.C. 216, 217 (1820).

43. *Id.*

44. *Id.* at 543, 5 S.C. at 218.

45. "Upon the principle of reciprocity, as well as good faith, the parties ought to be placed upon the same footing they would have been if there had been no deception; and that is the effect of this verdict." *Id.* at 544, 5 S.C. at 218.

46. The damages were tied to the contract as the difference in the two sale prices in which the buyer sustained the loss.

47. 70 S.C. 108, 49 S.E. 232 (1904).

48. *Id.*

it is apparent that the court intended to award consequential damages.<sup>49</sup> As both *Rose* and *Welborn* were deeply involved with the problems of form, the difficulties with which they were most concerned would not arise under modern liberal rules of pleading. The ultimate import of these cases lies in their establishing the basic authority for the "fraudulent breach doctrine."<sup>50</sup>

Later cases, while not without technical pleading problems, clearly indicate that the action is both tort and contract, and even though the pleading may be arranged physically within one paragraph, that paragraph must allege all the elements of a breach of contract and of the tort of fraud.<sup>51</sup> Thus it would seem that regardless of form, two causes of action must be alleged and proved.<sup>52</sup>

Perhaps the most significant aspect of the cases decided under the South Carolina rule regarding insurance contract actions is the sensitivity of the South Carolina court to misconduct on the part of the insurance companies.<sup>53</sup> There is apparently a tendency to regard any misconduct which causes harm as a "fraudulent act."<sup>54</sup> Moreover, it would appear that it is this sensitivity to misconduct which in reality applies the greatest pressure on the insurance company doing business in South Carolina to conduct its affairs properly.<sup>55</sup>

#### EXPANSION OF THE HADLEY RULE: CALIFORNIA

If the distinguishing feature of the South Carolina "doctrine" is its sensitivity to misconduct on the part of the insurer, the recent California decision of *Reichert v. General Insurance Company of America*<sup>56</sup> indicates that, in California at least, a reinterpretation of the common law has widened the scope of liability heretofore restricted by the rule of *Hadley v. Baxendale*, as codified in California Civil Code, sec-

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49. *Id.* at 110, 49 S.E. at 235-238.

50. Annot. 84 ALR 1345, 1351-52 (1933).

51. *Felder v. Great Am. Ins. Co.*, 260 F. Supp. 575 (C.D. S.C. 1966); *Traco Steel, Inc. v. Mitchell*, 39 F.R.D. 320 (A.D. S.C. 1966); *Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904).

52. *Felder v. Great Am. Ins. Co.*, 260 F. Supp. 575 (C.D. S.C. 1966); see *Export Ins. Co. v. Herrera*, 426 S.W.2d 895 (Tex. Civ. App. 1968); *Haigler v. Donnelly*, 18 Cal.2d 674, 117 P.2d 331 (1941).

53. *Corley v. Coastal States Life Ins. Co.*, 244 S.C. 1, 135 S.E.2d 316 (1964).

54. *Id.*; *Dawkins v. National Liberty Life Ins. Co.*, 252 F. Supp. 800 (C.D. C.C. 1966).

55. *Smith*, *supra* note 26.

56. *Reichert v. General Ins. Co. of America*, 53 Cal. Rptr. 693 (5th Dist. Ct. App. 1966), *rehearing granted* 59 Cal. Rptr. 724, 428 P.2d 860 (1967).



tion 3300.<sup>57</sup> In *Reichert*, defendant issued a fire insurance policy covering a portion of the risk of plaintiff's motel.<sup>58</sup> The motel was partially destroyed by fire and insured claimed the benefits under the policy, which the company refused to pay.<sup>59</sup> Plaintiff was forced into bankruptcy and the motel passed into the hands of a receiver.<sup>60</sup> On appeal, the district court of appeals<sup>61</sup> held that plaintiff had no standing to sue and then discussed the issue of damages in terms of the well-established common law view.<sup>62</sup>

The case reached the Supreme Court of California<sup>63</sup> where the issue of damages was again twofold: (1) plaintiff claimed actual damages under the policy and, in addition, damages for his entire loss as a result of the bankruptcy;<sup>64</sup> and (2) punitive damages were claimed for defendant's willful refusal to pay.<sup>65</sup> The court, while agreeing that plaintiff should recover his actual loss of the policy amount plus the loss attributable to the bankruptcy,<sup>66</sup> would not allow punitive damages under California Civil Code, section 3294, because the action sounded in contract.<sup>67</sup>

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57. Compare *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854) with CAL. CIV. CODE § 3300 (1957). See *Baumgarten v. Alliance Assur. Co.*, 159 F. 275 (N.D. Cal. 1908).

58. Of the total premiums paid on four policies (\$31,730.55) defendant received \$7,859.25. Of the total risk (\$1,375,000.00) defendant's contract liability to plaintiff was \$375,000.00. Plaintiff claimed that his actual loss was \$1,500,000, or the value of the property he lost as a result of the bankruptcy. The trial court sustained defendant's demurrers to the complaint without leave to amend. The district court affirmed following the interpretation of the California Civil Code in *Baumgarten v. Alliance Assurance Co.*, 159 F. 275 (N.D. Cal. 1908) and *New Orleans Ins. Ass'n v. Piaggio*, 83 U.S. (16 Wall.) 378 (1872).

59. Although the breach was allegedly done "maliciously and oppressively," the action was held to be one of contract for which exemplary damages could not be awarded. *Reichert v. General Ins. Co. of America*, 53 Cal. Rptr. 693, 699 (5th Dist. Ct. App. 1966). The Supreme Court of California agreed with this position. *Reichert v. General Ins. Co. of America*, — Cal.2d —, 428 P.2d 860, 59 Cal. Rptr. 724, 733 (1967).

60. The plaintiff alleged as a motive for the breach the desire of defendant to cause the bankruptcy. *Reichert v. General Ins. Co. of America*, 53 Cal. Rptr. 693, 694 (5th Dist. Ct. App. 1966).

61. *Id.* at 701.

62. *Id.* See also *Loudon v. Taxing Dist.*, 104 U.S. 771 (1881); *New Orleans Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378 (1872). CAL. CIV. CODE § 3302 (1957). See cases cited under 15 AM. JUR. *Damages* 153 (1938).

63. *Reichert v. General Ins. Co. of America*, — Cal.2d —, 428 P.2d 860, 59 Cal. Rptr. 724 (1967).

64. The aggregate amount was again \$1,500,000 referred to as "actual" damages.

65. The amount asked was \$5,000,000.

66. *Reichert v. General Ins. Co. of America*, — Cal.2d —, 428 P.2d 860, 864-867, 59 Cal. Rptr. 724, 728-731 (1967).

67. *Id.*, 428 P.2d at 869, 59 Cal. Rptr. at 733. CAL. CIV. CODE § 3294 (1957) is

In rejecting the narrow rule of *New Orleans Ins. Assoc. v. Piaggio*<sup>68</sup> on the dual rationale that an insurer's liability is not limited to the amount stated in the policy<sup>69</sup> and that the California Civil Code, section 3302, is not an exclusive measure of damages,<sup>70</sup> the court paved the way for a more liberal interpretation of section 3300.<sup>71</sup>

In awarding consequential damages, the court rejected common law theory,<sup>72</sup> holding that an "insurance company is chargeable with the knowledge of why people have fire insurance and of the likelihood that improper delay in payment may result in the very injuries for which the insured sought protection by purchasing the policies."<sup>73</sup> The court reasoned that damages for breach of a fire insurance contract are "all the detriment . . . flowing from the breach which the breaching party contemplated or *should have* contemplated . . . as *likely to result* from his failure to perform."<sup>74</sup> Thus it appears that a much broader scope of liability has emerged. The question of the contemplation of the parties would never have been reached if the court had followed the *Baumgarten v. Alliance Assur. Co.*<sup>75</sup> interpretation of California Civil Code, section 3302. It is also extremely doubtful under the traditional application of the rule of *Hadley v. Baxendale*<sup>76</sup> that bankruptcy of the

as follows:

Exemplary Damages, When Allowable. In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to actual damages, may recover exemplary damages for the sake of example and by way of punishing the defendant.

See *Ward v. Taggart*, 51 Cal.2d 736, 336 P.2d 534 (1959); *Haigler v. Donnelly*, 18 Cal.2d 674, 117 P.2d 331 (1941).

68. Cf. note 7 *supra*.

69. The court stated that:

It is true that *Baumgarten v. Alliance Ins. Co., C.C.*, [sic] 159 F[ed.] 275, 277, held that section 3302 prevents an insurance company from being liable for more than the face value of the policy, plus interest from the time the insurer should have paid the claim. *Baumgarten's* interpretation of section 3302 is simply incorrect.

*Reichert v. General Ins. Co. of America*, — Cal.2d —, 428 P.2d 860, 867, 59 Cal. Rptr. 724, 731 (1967).

70. The court held that the fact that full compensation could be rendered by payment of amount due plus legal interest is a rebuttable presumption.

71. See CAL. CIV. CODE § 3300 (West 1957).

72. *Reichert v. General Ins. Co. of America*, — Cal.2d —, 428 P.2d 860, 866, 59 Cal. Rptr. 724, 730 (1967).

73. *Id.*, 428 P.2d at 864, 59 Cal. Rptr. at 728.

74. *Id.*, 428 P.2d at 865, 59 Cal. Rptr. at 731 (emphasis added).

75. 159 F. 275 (N.D. Cal. 1908).

76. 156 Eng. Rep. 145, 151 (Ex. 1854).

insured would be considered to have been within the reasonable contemplation of the parties. A comparison between *Reichert* and *Rose v. John S. Beatie*<sup>77</sup> leads to the conclusion that in each, regardless of traditional theory, the court's object was to provide full compensation for the injured party.

#### PROTECTION REQUIRED FOR INSURER AND INSURED

Whether the correction of the abuse of an insured by an insurer be undertaken legislatively or judicially, the need for a balance between the interests of insurance companies, the individual, and society must be recognized. The improper and extravagant assessment of damages against a company will not only tend to force the companies to compensate through an increase in rates, but may in a given case impair the rights of other policyholders. It has become a truism that insurance provides a substantial basis for individual and group economic stability. That the policyholders of insurance companies look to the company, not only for protection from disaster, but also for stability in investment and certainty in estate planning, makes the insurer in some degree a protector of social order and general economic stability. Any action against an insurance company must be viewed in the light of its ultimate effect on society. It is in the interest of society that insurers be solvent, and that the insurer be able to compensate for risks undertaken when called upon to do so. It also seems essential that the insurer be able to calculate the risk that he will underwrite, and contract to protect for specifically stated risks based upon those calculations. The law of contract, which has generally supported this aspect of the insurance business, ought not now to be changed so drastically as to create instability and uncertainty in the ordinary business of an industry upon which so much of modern society depends for compensation in time of personal disaster or incapacity.

#### CONCLUSION

While the effect of some excess liability may be to force insurers to handle claims properly, it is no less likely that awards of unreasonably heavy damages in excess of policy limits may tend to encourage speculative claims, making the companies greater prey to fraud than they now are. Additionally, in view of the well-recognized popular prejudice against insurance companies, some protection must be afforded by

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77. *Rose v. Beatie*, 2 Nott & McCord 538, 544, 5 S.C. 216, 218 (1820).

courts and legislatures. In particular, the courts should neither allow nor encourage unreasonable damages for the wrongful conduct of an insurer, but should act within the general framework of awarding such damages as will place the plaintiff in the position he would have occupied had there been no breach.<sup>78</sup> In a given case this may mean that the insured will be allowed damages in excess of the benefits allowable under the policy where the insurer has been guilty of actionable misconduct toward the insured. It may also ordinarily mean that costs and reasonable attorney's fees will be awarded plaintiff where the insurer is in fact guilty of misconduct. But in awarding damages beyond these limits, courts should proceed with reluctance and with the knowledge that excessive damages may not serve the public good. Punishment of the company should be left to the regulatory bodies set up for that purpose.<sup>79</sup>

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78. *Reichert v. General Ins. Co. of America*, — Cal.2d —, 428 P.2d 860, 866, 59 Cal. Rptr. 724, 730 (1967).

79. *Smith*, *supra* note 26.