CRISCI v. SECURITY INSURANCE CO.: THE DAWN OF THE MODERN ERA OF INSURANCE: BAD FAITH AND EMOTIONAL DISTRESS DAMAGES

Jeffrey E. Thomas*

I have chosen Crisci v. Security Insurance Co.1 as "my favorite insurance case" for this symposium issue because it typifies the doctrine of "bad faith," one of the most interesting and important contributions of insurance law to the general body of law. It "typifies" the doctrine with its classic, if somewhat extreme, fact pattern,2 and with its reliance on the implied covenant of good faith and fair dealing3 for the recognition of a cause of action that sounds in tort.4 Yet it also represents a potential for bad faith law that has not yet been fulfilled: the promise of emotional distress damages for an insurer's failure to settle.

I take this opportunity to explore both what Crisci has contributed and what it may still contribute. I will begin with a brief overview of the case itself, followed by an analysis of its historical contribution to bad faith law generally. I will then turn to the issue of emotional distress to describe how courts have responded to Crisci on that issue, and to make a normative argument that emotional distress damages should be routinely available in bad faith cases.

I. THE CASE ITSELF

A. The Facts

The facts of Crisci are not complicated. Rosina Crisci owned an apartment building and purchased $10,000 worth of general liability insurance from Security Insurance Company. One of Mrs. Crisci's tenants, June DiMare, was descending an exterior wooden staircase when it gave way, causing her to fall through the opening to her waist and to hang some fifteen feet above the ground for a period of time. Mrs. DiMare suffered physical injuries from the

* Tiera M. Farrow Faculty Scholar and Associate Professor of Law, University of Missouri, Kansas City. I wish to thank Lawrence Machachlan, Nancy Morgan, and John M. Lyon for their research assistance.


2 I doubt a law professor could hypothesize any better set of facts to justify imposition of bad faith liability.

3 426 P.2d at 176.

4 Id. at 178. The case made the tort basis for the claim clearer and more explicit. See infra text accompanying notes 64-70.
incident, and afterwards experienced a very severe psychosis requiring hospitalization. She sued Crisci seeking $400,000 in damages.\(^5\)

Security Insurance Company provided Crisci with a defense under a reservation of rights. It retained an experienced and competent attorney who handled the case with the aid of investigators and a claims manager.\(^6\) The attorney reported that the case was one in which liability was clear, and that the verdict might be very large if the psychosis could be attributed to the incident at the apartment building. As the case developed, both sides found expert medical testimony to support their positions. The claims manager noted that the cause of the psychosis would be a question for the jury, but that if the jury believed plaintiff’s expert, the damages could reach $150,000. The attorney essentially agreed, though he set the exposure at $100,000.\(^7\)

DiMare eventually offered to settle for the $10,000 policy limits. By this time, however, Security was convinced that it could establish through its expert that the psychosis was not caused by the incident. As a result, Security would offer no more than $3000 to settle the case. DiMare lowered her offer to $9000, and Crisci was willing to contribute $2500 of her own money to a settlement, but Security rejected that offer.\(^8\)

The jury returned a verdict of $100,000 for DiMare and $1000 for her husband. This verdict was sustained on appeal.\(^9\) Security then paid its $10,000 policy limits. Although it is unclear whether the remaining $91,000 of the judgment was satisfied by a settlement,\(^10\) or whether DiMare executed on the judgment,\(^11\) Crisci was left essentially destitute. The California Supreme Court summarized her condition:

Mrs. Crisci, an immigrant widow of 70, became indigent. She worked as a babysitter, and her grandchildren paid her rent. The change in her financial condition was accompanied by a decline in physical health, hysteria, and suicide attempts.\(^12\)

B. The Holding and Analysis

In the action brought by Crisci, the trial court awarded $91,000 plus interests and costs for the excess of the DiMare judgment over the policy limits, and an additional $25,000 for Crisci’s emotional distress damages.\(^13\) The California Court of Appeals affirmed the trial court’s holding of bad faith, but reversed the emotional distress damages. The California Court of Appeals held that the

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\(^{5}\) Id. at 175.


\(^{7}\) Id.

\(^{8}\) See id. at 289-90.

\(^{9}\) Id. at 290.

\(^{10}\) According to the California Supreme Court’s account: “A settlement was arranged by which the DiMares received $22,000, a 40 percent interest in Mrs. Crisci’s claim to a particular piece of property, and an assignment of Mrs. Crisci’s cause of action against Security.” Crisci v. Sec. Ins. Co., 426 P.2d 173, 176 (Cal. 1967).

\(^{11}\) According to the California Court of Appeals: “Mrs. DiMare satisfied a portion of her judgment by execution and sale of respondent’s property and stripped her of all her material possessions.” 52 Cal. Rptr. at 290.

\(^{12}\) 426 P.2d at 176.

\(^{13}\) Id. at 175.
bad faith claim was based on contract, not tort, and that the contract claim
could not support an award of emotional distress damages. The California
Supreme Court affirmed the trial court on both bad faith and emotional distress
damages.

C. Bad Faith

As to the bad faith issue, the California Supreme Court essentially fol-
lowed the case of Comunale v. Traders & General Insurance Co. The court
found, pursuant to Comunale, that the Security policy included an “implied
covenant of good faith and fair dealing that neither party [would] do anything
which [would] injure the right of the other to receive the benefits of the agree-
ment.” In light of this implied covenant, Security had the duty to “give the
interests of the insured at least as much consideration as it gives to its own
interests” when evaluating a settlement offer. The test for determining
whether Security had fulfilled its duty was “whether a prudent insurer without
policy limits would have accepted the settlement offer.”

Applying this test, the California Supreme Court found that the settlement
offer should have been accepted. Both Security’s claims adjuster and the
retained attorney recognized that the case could result in a verdict of at least
$100,000, far above the $10,000 policy limits. Although Security believed that
the verdict would be much lower in reliance on expert testimony that the psy-
chosis was not caused by the accident, a trier of fact could find that this belief
was unreasonable. DiMare had reputable psychiatrists who would testify to
her theory of causation, and Security had been told that the issue was so close
“that in a group of 24 psychiatrists, 12 could be found to support each side.”
The California Supreme Court concluded:

The trial court found that defendant “knew that there was a considerable risk of
substantial recovery beyond said policy limits” and that “the defendant did not give
as much consideration to the financial interests of its said insured as it gave to its own
interests.” That is all that was required. The award of $91,000 must therefore be
affirmed.

In the course of discussing this issue, the California Supreme Court clari-
14 See 52 Cal. Rptr. at 291. The California Court of Appeals noted that emotional distress
damages might be available for breaches of contracts that “concerned the comfort, happiness
and welfare of one of the parties,” but found that the Security insurance policy was not such
a contract. Id.
15 Crisci, 426 P.2d at 179.
16 328 P.2d 198 (Cal. 1958).
17 Crisci, 426 P.2d at 176.
18 Id.
19 Id.
20 Id. at 178.
21 Id.
22 Id.
23 Id. at 176.
cases had language that could be construed to require such evidence,\textsuperscript{24} a careful reading of those cases and Communale showed that liability was based not on a “bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements.”\textsuperscript{25}

The California Supreme Court toyed with, but ultimately did not adopt, a rule of strict liability for bad faith refusal to settle. In support of this proposed rule, the court noted that it might be consistent with policyholder expectations,\textsuperscript{26} and that such a rule would be simple to apply.\textsuperscript{27} In addition, a rule of strict liability would promote justice because “in this situation where the insurer’s and insured’s interests necessarily conflict, the insurer, which may reap the benefits of its determination not to settle, should also suffer the detriments of its decision.”\textsuperscript{28} Nevertheless, the court did not adopt the rule (or weigh possible countervailing considerations) because the evidence was “clearly sufficient to support the determination that Security breached its duty to consider the interests of Mrs. Crisci in proposed settlements.”\textsuperscript{29}

\textbf{D. Emotional Distress Damages}

Unlike the California Court of Appeals, which reversed on the emotional distress issue, the California Supreme Court affirmed the trial court’s award of emotional distress damages. The court reasoned that the cause of action sounded both in tort and contract.\textsuperscript{30} Fundamentally, the court found “that an injured party should be compensated for all damage proximately caused by the wrongdoer.”\textsuperscript{31} The goal of compensating tort victims justifies allowing victims to recover “for all detriment caused whether it could have been anticipated or not.”\textsuperscript{32} The court then broadly applied the tort rule for emotional distress damages. Noting that emotional distress damages are available for plaintiffs who also suffer personal injury or interference with property rights, the court extended the rule to those who lose their property and suffer emotional distress.\textsuperscript{33} The court concluded: “No substantial reason exists to distinguish the


\textsuperscript{25} \textit{Crisci}, 426 P.2d at 177.

\textsuperscript{26} The \textit{Crisci} court explained:

\begin{quote}
[I]n light of the common knowledge that settlement is one of the usual methods by which an insured receives protection under a liability policy, it may not be unreasonable for an insured who purchases a policy with limits to believe that a sum of money equal to the limits is available and will be used so as to avoid liability. . . .
\end{quote}

\textit{Id.}

\textsuperscript{27} “The proposed rule is a simple one to apply and avoids the burdens of a determination whether a settlement offer within the policy limits was reasonable.” \textit{Id.}

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{Id.}

\textsuperscript{30} In making this point, the California Supreme Court clarified that the claim is not one sounding solely in contract law. \textit{See id.} at 178 n.3.

\textsuperscript{31} \textit{Id.} at 178.

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.} at 179. Professor John Bauman noted that the cases relied upon for allowing emotional distress damages were not very convincing. John H. Bauman, Emotional Distress Damages and the Tort of Insurance Bad Faith, \textit{46} \textit{Drake L. Rev.} 717, 738 (1998).
cases which have permitted recovery for mental distress in actions for invasion of property rights” from those involving loss of property.\textsuperscript{34}

The California Supreme Court also addressed the principle policy objections to allowing emotional distress damages. Those objections were identified as the risk of false claims and the possibility of litigation over trivial claims.\textsuperscript{35} The court found that those concerns were minimized by the fact that the bad faith conduct of the insurer had caused substantial economic damages apart from the emotional distress.\textsuperscript{36}

The court limited the availability of emotional distress damages to the insurance context. It noted that “[r]ecovery 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.”\textsuperscript{37} The insurance context was distinguished from other contract situations by the fact that the insurer had a tort duty to settle as well as a contractual duty, and by the fact that one of the purposes of insurance was to protect against this kind of mental distress. The court found:

"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.\textsuperscript{38}"

\section*{II. Historical Contribution}

The California Supreme Court’s opinion in \textit{Crisci} made a substantial contribution to the development of modern bad faith law. Although the historical roots of bad faith law may be traced back some fifty years prior to the \textit{Crisci} decision,\textsuperscript{39} the California Supreme Court opinion “popularized” the doctrine to the point that liability for an insurer’s bad faith refusal to settle within policy limits has now become the majority rule.\textsuperscript{40} In addition, the \textit{Crisci} opinion helped to establish that the cause of action was based on the implied covenant of good faith and fair dealing, sounded in tort rather than contract, and that one way to assess bad faith was whether an insurer would accept the settlement offer if its policy had no limits. Each of these contributions will be considered in turn.

\textsuperscript{34} \textit{Crisci}, 426 P.2d at 179.
\textsuperscript{35} \textit{Id}.
\textsuperscript{36} \textit{Id}.
\textsuperscript{37} \textit{Id}.
\textsuperscript{38} \textit{Id}. (citing Chelini v. Nieri, 196 P.2d 915 (Cal. 1948)).
\textsuperscript{39} See Kent D. Syverud, \textit{The Duty to Settle}, 76 VA. L. REV. 1113, 1116 (1990). Professor (now Dean) Syverud traces the doctrine back to 1915-16. \textit{See id} at 1116 n.4.
\textsuperscript{40} As one commentator notes, “Virtually all jurisdictions that have considered the matter have concluded that the insurer, in deciding how to respond to a policy limits settlement offer, owes the insured some kind of duty to consider his interests.” STEPHEN S. ASHLEY, \textit{BAD FAITH ACTIONS: LIABILITY AND DAMAGES} § 2:04, at 2-7 (2d ed. 1997). “The majority of courts have expressed the insurer’s duty to the insured in responding to settlement offers in terms of good faith rather than due care.” \textit{Id} § 2:05, at 2-9. \textit{See also} JEFFREY W. STAMPFEL, \textit{LAW OF INSURANCE CONTRACT DISPUTES} Ch. 10 (2d ed. 1999 & Supp. 2002) (citing \textit{Crisci} in three of seven sections in the chapter).
A. Crisci Popularized Bad Faith Law

One way to gauge the influence of the Crisci decision is to see how often it has been cited. By this measure, its impact is very significant. It has been cited in more than 300 court opinions, including 91 opinions by the states’ highest courts, and 26 opinions of the United States Courts of Appeal. It has also been cited in more than 100 law review articles, and when bar journals and other professionally-oriented publications are included, the number of articles citing the case more than doubles.

The sheer number of citations is significant in its own right, but the influence of Crisci can also be seen by these numbers in comparison to citations of other important bad faith cases. For example, one of the earliest bad faith opinions from a state supreme court is Hilker v. Western Automobile Insurance Co., decided by the Wisconsin Supreme Court in 1930. In that case the court held that an automobile insurer was liable for the excess judgment because it failed to make reasonable efforts to settle the case. The insurer acted unreasonably by failing to fully investigate liability in the case, and by offering only $1500 of a $5000 policy limit. The plaintiff’s damages were serious enough that a verdict in excess of the policy limits was likely, but her lawyer suggested that his client would agree to settle for $2500 or $3000.

Compared to Crisci, this landmark case, which had an additional thirty years to accumulate citations, had only about one-third as many citations in

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41 I ran the search “Crisci /s Sentry” in the “Federal and State Federal Cases after 1944” library in Lexis database on October 17, 2001. It found 346 cases. I spot-checked a number of the cases, and they consistently were citing to Crisci v. Security Insurance Co., 426 P.2d 173 (Cal. 1967). The same search run in the Westlaw All Cases after 1944 library and found 345 cases on October 17, 2001.

42 The search “Crisci /s Sentry” in the “Highest Court, All States” library of the Lexis database found ninety-one cases. Although many of the cases were from the Supreme Court of California, the highest court in twenty-nine other states had cited Crisci. High Courts from the following states cited Crisci: Alabama, Alaska, Arizona, Colorado, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, West Virginia, and Wyoming.

43 I ran the search “Crisci /s Sentry” in the “U.S. Courts of Appeal Cases - All Circuits” library of the Lexis database. It found twenty-six cases. Although many of the cases were from the Ninth Circuit (which includes California), the Third, Sixth, Seventh, and Eighth Circuits also cited Crisci.


47 Id. at 260-61. The court used an agency theory to justify its holding. It found that an agent has a duty to protect the interests of its principle, and therefore that the insurer, as an agent of the insured, had an obligation to reasonably perform the defense and potential settlement of the case. See id. at 259.

48 See id. at 260.

49 At one point Ashley notes: “In the first edition of this book I credited the Hilker court with establishing the modern tort of bad faith. Upon further reflection I have concluded that the importance of this case can also be seen from its relationship to Crisci.” See Ashley, supra note 40, § 2:09, at 2-27. Although not directly relied upon by Crisci, Hilker was
cases, and only about one-fourth as many citations in law reviews. The difference is smaller in citations by the highest state courts, though Crisci was still cited more often. Hilker was cited in sixty-three opinions of the highest state courts, compared to ninety-one for Crisci. Thus, by comparison Crisci's contribution was substantial.

Another interesting case for comparison is Comunale v. Traders & General Insurance Co. That case, decided in 1958, was the first in which the California Supreme Court held that an insurer could be liable beyond its policy limits for bad faith refusal to settle, and was relied upon by the same court in Crisci. In Comunale, the insurer refused to defend or settle a case brought by a pedestrian who was hit by a truck. The insurer maintained that there was no coverage because the truck did not belong to the driver. During the trial, the plaintiff offered to settle for $4000, well below the policy limits of $10,000, but the insurer refused, continuing to rely on its coverage position. The California Supreme Court, relying in part on Hilker, found that the insurance policy included an implied covenant of good faith and fair dealing, and that the insurer, pursuant to that covenant, had a duty to consider the insured's interest in accepting a proposed settlement. The court held that,

an insurer, who wrongfully declines to defend and who refuses to accept a reasonable settlement within the policy limits in violation of its duty to consider in good faith the interest of the insured in the settlement, is liable for the entire judgment against the insured even if it exceeds the policy limits.

As the first pronouncement of the doctrine of bad faith by the California Supreme Court, Comunale was widely cited and discussed, but comparison of relied upon by the California Supreme Court in Comunale v. Traders & General Insurance Co., 328 P.2d 198, 200-01 (Cal. 1958), which in turn was relied upon by Crisci. See Crisci v. Sec. Ins. Co., 426 P.2d 173, 176-77 (Cal. 1967).

A search on October 19, 2001, of the “Federal and State Federal Cases after 1944” library in Lexis using “Hilker’s Western” revealed 101 cases.


The search “Hilker’s Western” in the “Highest Court, All States” library of the Lexis database found sixty-three cases on October 19, 2001. Those cases included opinions from twenty-five states other than Wisconsin, which is pretty close to the number of states in which Crisci was cited by the highest court (twenty-eight states). High courts from the following states cited Hilker: Alabama, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, Oregon, South Dakota, Texas, Vermont, Washington, Wisconsin, and Wyoming.

The states citing to Crisci but not to Hilker include: Alaska, Kentucky, Louisiana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, and West Virginia. The states citing to Hilker but not to Crisci include: Connecticut, Florida, Maryland, Massachusetts, Missouri, New Mexico, Vermont, Washington, Wisconsin, and Wisconsin.


See Crisci, 426 P.2d at 176-77. Comunale was also instrumental in linking bad faith claims to the implied covenant of good faith and fair dealing, see Ashley, supra note 40, § 2:07-2:08, and, in Ashley's view "deserves a large share of the glory" for creating the cause of action, along with Hilker, see id. § 2:09, at 2-27 n.47.

See Comunale, 328 P.2d at 200.

See id. at 200-01.

Id. at 202.
citations shows that Crisci, decided nine years later, was roughly as influential. Both cases have been cited in hundreds of opinions, though Comunale was cited in fifty-nine more overall. In the highest state courts, the number of citations was virtually the same, with only one additional citation to Comunale. Crisci was somewhat more influential in the academic literature. It was cited in twenty-seven more articles than Comunale. Although this comparison does not favor Crisci as much as the comparison to Hilker, it nonetheless shows that Crisci was a very influential opinion.

B. Crisci Contributed to the Doctrinal Development of Bad Faith Law

Another way to consider the influence of Crisci is with respect to particular doctrinal developments in bad faith law. The opinion in Crisci helped to establish that the claim for bad faith refusal to settle was based on the implied covenant of good faith and fair dealing, sounded in tort, and could be evaluated by consideration of whether the insurer would have accepted the settlement if the policy limits did not apply.

The California Supreme Court’s decision in Comunale was the turning point that established the implied covenant of good faith and fair dealing as the basis for a bad faith refusal to settle claim. That has become the predominant basis for bad faith liability. Crisci continued the trend by expressly relying on the implied covenant, and because it was widely cited in support of the

58 The search “Comunale /s Traders” found 405 cases in the “Federal and State Federal Cases after 1944” library in Lexis on October 19, 2001, compared to 346 cases citing Crisci. See supra note 41.

59 The search “Comunale /s Traders” found ninety-two cases in the “Highest Court, All States” library of the Lexis database on October 19, 2001, compared to ninety-one citing to Crisci. See supra note 42. The ninety-two opinions citing to Comunale came from the highest court of thirty different states outside of California, compared to opinions of the highest court from twenty-nine states citing to Crisci. See supra note 42. The highest courts from Alaska, Iowa, Louisiana, Ohio, and West Virginia cited to Crisci but not to Comunale. The highest courts from Maryland, Missouri, New Mexico, Tennessee, Washington, and Wisconsin cited to Comunale but not Crisci.

I considered the possibility that cases were simultaneously citing to both Crisci and Comunale, but the search of “Comunale /s Traders but not Crisci” in the “Highest Court, All States” library of the Lexis database on October 24, 2001, found forty-nine cases. The search of “Crisci /s Security but not Comunale” in the same library on the same day found forty-eight cases. Switching to the “Federal and State Federal Cases after 1944” library in Lexis, I found 192 cases citing to Crisci, but not to Comunale using the search “Crisci /s Security but not Comunale” on October 24, 2001.

60 The search “Comunale /s Traders” found 100 articles in the “Law Reviews, Combined” library of the Lexis database on October 19, 2001, compared to 127 articles from a similar search for Crisci. See supra note 44. This difference grows to eighty articles when the search was done in the Westlaw “Journals and Law Reviews Combined” database. The search of “Comunale /s Traders” done on October 19, 2001, found 212 articles compared to the 292 articles found on October 17, 2001, citing Crisci. See supra note 44.

61 See ASHLEY, supra note 40, § 2:07-2:09 (tracing the doctrine from Comunale through Hilker and Brassil v. Maryland Casualty Co., 104 N.E. 622 (N.Y. 1914)); see also ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 25G, at 154 (2d ed. 1996); STEMPLE, supra note 40, § 10.03 (treating Crisci as more prominent case than Comunale).

claim for bad faith refusal to settle, it helped to establish that the claim was based on the implied covenant.  

_Crisci_ also helped to establish that the claim was one that sounded in tort.  

On this point, _Crisci_ helped to clarify any ambiguity left by _Comunale_. The court in _Comunale_ relied on the contractual nature of the claim in order to avoid the consequences of the shorter statute of limitations applicable to torts. The court noted that a bad faith claim "has generally been treated as a tort," but held that, for purposes of the statute of limitations, the plaintiff had the "freedom of election between an action of tort and one of contract." As a result, even though the statute of limitations had passed for a tort claim, the plaintiff was not precluded from maintaining a bad faith claim as a matter of contract.

This reliance on the contract statute of limitations led some lower courts to conclude that the claim sounded in contract rather than tort. Crisci unequivocally corrected this view, noting that the claim sounded in both tort and contract, and specifically disapproving cases that could be interpreted as holding otherwise. This helped to solidify the predominant view that the cause of action sounds in tort.  

Many of the cases citing to _Crisci_ follow its lead and treat the claim as sounding in tort. A third substantive area in which _Crisci_ has made a contribution concerns the test to be applied in evaluating whether an insurer breached its duty. This is one of the most difficult areas of bad faith law. Courts apply a wide range of tests in deciding whether an insurer has acted in bad faith. Consequently, _Crisci's_ contribution in this area is more limited. _Crisci_ applied a test that

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64 One commentator noted that "it is common" to cite _Crisci_ "as the leading case" establishing tort liability for failure to settle. See Bauman, supra note 33, at 720 n.12. Accord Stempel, supra note 40, at 10-17-10-19.


66 Id.


68 Crisci, 426 P.2d at 178.


71 See Ashley, supra note 40, § 3:14 (courts have provided "little practical guidance on precisely when an insurer must accept a settlement offer"); Jerry, supra note 61, §25G[2] ("[d]escriptions of what constitutes ‘bad faith’ conduct are diverse"); Richmond, supra note 62, at 96 ("’Bad faith’ conduct defies uniform definition."). This doctrinal uncertainty has existed for nearly fifty years. Professor (now Judge) Keeton noted in 1954 that “Courts have
considered whether an insurer would have accepted the settlement if the policy did not include any limit on liability. This test was first articulated and proposed by Professor (now Judge) Keeton in his influential 1954 article. Although Crisci did not attribute the test to Keeton, its articulation of the test was cited and relied upon by other courts. While this has not become a predominant rule for bad faith, it is one of the accepted ways of evaluating whether an insurer acted in bad faith.

Crisci's contribution in each of these three areas was significant, and helps to demonstrate that it was a seminal opinion. The most groundbreaking part of the Crisci opinion, however, was the decision to permit emotional distress damages. While Crisci helped to explain and advance these various aspects of bad faith law, it was the first decision to uphold emotional distress damages for an insurer's bad faith refusal to settle. We now turn to an analysis of Crisci's contribution to this particular doctrine.

III. CONTRIBUTION TO EMOTIONAL DISTRESS DAMAGES

It is difficult to gage Crisci's contribution for the availability of emotional distress damages due to an insurer's bad faith conduct. Some observers tend to treat Crisci as an isolated case in that it has done little to make emotional distress damages more available. On the other hand, others have gone so far disagreed regarding the standard used in defining this duty to settle." Keeton, supra note 69, at 1139.

See Crisci, 426 P.2d at 176.
See Keeton, supra note 69, at 1148.

The Crisci court cites to five court of appeals decisions, see Crisci, 426 P.2d at 176, none of which articulate the test as one requiring consideration without the policy limits. The characterization from Critz v. Farmers Insurance Group, 41 Cal. Rptr. 401 (Ct. App. 1965), is typical: "The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest." Id. at 404 (quoting Comunale, 328 P.2d at 200-01). It should be noted that the Crisci court was aware of Keeton's article. See Crisci, 426 P.2d at 178 n.3 (citing Keeton's article).


See Ashley, supra note 40, §§ 3:19-3:20; see also 7C JOHN ALAN APPLEMAN & JEAN APPLEMAN, APPLEMAN ON INSURANCE LAW AND PRACTICE § 4712, at 451 (text accompanying note 55) (1997). For an example of cases endorsing or utilizing this approach, see Clearwater, 792 P.2d at 723; Walbrook Ins. Co. v. Liberty Mut. Ins., 7 Cal. Rptr. 2d 513, 519 (Ct. App. 1992); Kooymann v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 34 (Iowa 1982).

As Professor Bauman notes:

The innovation of the Crisci case, then, was to transfer this familiar tort doctrine to a new basis – the breach of the implied covenant of good faith and fair dealing – and to recognize that in addition to the traditional contract remedy, the plaintiff could also recover damages for emotional distress.

Bauman, supra note 33, at 739.

See, e.g., Kenneth Abraham, The Natural History of the Insurer's Liability for Bad Faith, 72 TEX. L. REV. 1295, 1302 n.30 (1994) (noting that "only a handful of reported cases" have allowed non-economic damages); Syverud, supra note 39, at 1121 n.18 (emotional distress damages are available in three states).
as to state that a policyholder "may generally recover damages for emotional distress caused by the insurer's misconduct." Upon closer examination, it is difficult to generalize about the case law allowing emotional distress damages. Although a number of courts have allowed emotional distress damages, they have relied upon various legal theories to justify such awards. These variations make it more difficult to trace the influence of Crisci regarding this doctrine. In the following subsection, I will outline the major theories used to permit emotional distress damages in bad faith cases, and in the next subsection I will consider the role that Crisci played in developing these theories.

A. Basis for Allowing Emotional Distress Damages

The availability of emotional distress damages is complicated by the variations in bad faith law. Although most courts have agreed that a party has a tort claim for an insurer's bad faith refusal to settle, there are four different approaches to bad faith for first party insurance claims: tort, contract, expanded contract, and statutory. A substantial number of jurisdictions recognize a tort claim for bad faith conduct in connection with first party insurance, but a significant number have rejected the tort theory. Of those courts rejecting the tort theory, some have permitted a contract theory with expanded damages, while others have recognized a statutory cause of action. The availability of emotional distress damages in the first party context is affected by which of these approaches is used.

The availability of emotional distress damages is further complicated by the possibility that the plaintiff might be able to recover under a related tort claim even if emotional distress damages are not available for bad faith. Virtually all states recognize the tort of intentional infliction of emotional distress, as

79 Ashley, supra note 40, § 8:04, at 8-10. Ashley cites to cases from twenty-one jurisdictions to support this statement with respect to first-party insurance, and to cases from eight jurisdictions to support this statement with respect to third-party insurance. He also cites cases from seven jurisdictions that are contrary on this point. Id. at 8-10-8-13 nn.26-27.
80 See supra note 40.
81 Ashley finds that recent decisions "have tipped the scales decisively in favor of the first-party tort and have clearly established it as the majority rule." Ashley, supra note 40, § 2:15, at 2-51. He notes that a "minority" has adopted the approach of Gruenberg v. Aetna Insurance Co., 510 P.2d 1032 (Cal. 1973), while the "majority" have followed the somewhat more stringent formula from Anderson v. Continental Insurance Co., 271 N.W.2d 368 (Wis. 1978). See id. at 2-51 to 2-52.
82 Professor Jerry characterizes this split as about fifty/fifty. See Jerry, supra note 61, §25G, at 157. Ashley finds that a "substantial minority" have rejected the tort claim, see Ashley, supra note 40, § 2:15, at 2-54 to 2-55 & nn.48-61 (citing cases from Florida, Georgia, Illinois, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, New York, Oregon, Pennsylvania, and Tennessee), and that a "few jurisdictions" have adopted expanded contract remedies, see id. at 2-53. See also Stempel, supra note 40, Ch. 10 (treating tort theory of recovery as clear majority rule).
83 See Ashley, supra note 40, § 2:15, at 2-53, nn.44-47 (citing cases from New Hampshire, New Jersey, Utah, and Virginia).
84 See id. at 2-57 to 2-58 nn.66-67 (citing statutes from Colorado, Florida, Georgia, Louisiana, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, and Rhode Island).
85 See Twyman v. Twyman, 855 S.W.2d 619, 621-22 nn.2-3 (Tex. 1993) (noting that forty-seven states have recognized the tort of Intentional Infliction of Emotional Distress). This
and plaintiffs sometimes include such claims along with those more directly for bad faith. 86 Moreover, some states also recognize a claim for negligent infliction of emotional distress, 87 which plaintiffs also try to use to supplement a claim for bad faith. 88

This combination of uncertainty in the bad faith law and its overlap with emotional distress torts makes it difficult to be precise about the extent to which jurisdictions allow emotional distress damages for bad faith conduct. In an effort to simplify the analysis, I will not consider the separate torts of intentional or negligent infliction of emotional distress. Intentional infliction is generally limited to outrageous conduct that causes severe distress, 89 which will make it unavailable in all but the most severe insurance bad faith cases. 90 Negligent infliction of emotional distress does not require outrageous conduct, and therefore would more readily permit emotional distress damages than the tort of intentional infliction of emotional distress. 91 Only a limited number of states have adopted that tort, however, and even where the tort has been adopted, courts have refused to apply it to insurer misconduct for various reasons. 92


89 See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

90 For examples of cases finding that an insurer's bad faith conduct was insufficient to meet the requirements of intentional infliction of emotional distress, see Metro. Life Insurance Co. v. McCarson, 467 So. 2d 277 (Fla. 1985); Roberts v. Auto-Owners Insurance Co., 374 N.W.2d 905 (Mich. 1985), and Cunningham v. Security Mutual Insurance Co., 689 N.Y.S.2d 290 (App. Div. 1999).


92 For examples of cases finding that an insurer's bad faith conduct was insufficient to meet the requirements of negligent infliction of emotional distress, see Deno v. Transamerica Title Insurance Co., 617 P.2d 35 (Ariz. 1980) (inadequate allegations of physical injury or bad state of mind), Lee v. Travelers, 252 Cal. Rptr. 468 (Ct. App. 1988) (absence of duty), and Jarvis v. Prudential Insurance Co., 448 A.2d 407 (N.H. 1982) (claims limited to bad faith breach of contract).

For a general discussion of negligent infliction of emotional distress, see Sandor & Berry, supra note 87.
In those cases considering emotional distress damages for insurance bad faith claims, courts have taken six different approaches. At one end of the spectrum, courts allow emotional distress damages as a routine part of compensatory tort damages. At the other end of the spectrum, courts reject emotional distress damages as beyond the scope of permissible contract damages. In between these two extremes are three compromise approaches. Some courts allow emotional distress damages if the plaintiff has other exceptional damages such as significant property or economic losses. Other courts allow emotional distress damages if the defendant has exceptional culpability, such as malice or other bad state of mind that would justify punitive damages. A third compromise approach is used by some courts that reject the tort theory of bad faith, and permits emotional distress damages as part of contract damages if the facts show them to be sufficiently foreseeable. Outside of this spectrum of approaches is a sixth approach allowing emotional distress damages for a


95 See, e.g., Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1041-42 (Cal. 1973) (holding allegation of substantial loss of property was sufficient to permit consideration of emotional distress damages); Maxwell v. Fire Ins. Exch., 70 Cal. Rptr. 2d 866, 869 (Cal. App. 1998) (holding economic loss is a "condition precedent to the recovery of emotional distress damages in a bad faith case"); Farmers Group, Inc. v. Trimble, 768 P.2d 1243, 1246 (Colo. Ct. App. 1988) (holding that "damages for emotional distress may properly be awarded upon a showing of substantial property or economic loss"); Anderson v. Cont'l Ins. Co., 271 N.W.2d 368, 896 (Wis. 1978) (holding that emotional distress damages are available "only when the distress is severe and substantial other damage is suffered apart from the loss of the contract benefits and the emotional distress"); State Farm Mut. Auto. Ins. Co. v. Shrader, 882 P.2d 813, 833 (Wyo. 1994) (holding that to recover emotional distress damages the plaintiff must have "suffered substantial other damages, such as economic loss, in addition to the emotional distress").


97 See, e.g., Roberts v. Auto-Owners Ins. Co., 374 N.W.2d 905, n.5 (Mich. 1985) (noting that recovery for emotional distress damages "is nevertheless permissible if such damages can 'reasonably be said to have been in contemplation of the parties at the time the contract was made'"); Beck v. Farmers Ins. Exch., 701 P.2d 795, 802 (Utah 1985) (noting that "in unusual cases, damages for mental anguish might be provable").

These statements are clearly dicta, and my research had not discovered any case holding that emotional distress damages are available under a contract theory for bad faith. The closest cases are Hall v. Citizens Insurance Co., 368 N.W.2d 250 (Mich. Ct. App. 1985) and Horton v. Gem Insurance Co., 794 P.2d 847 (Utah Ct. App. 1990). Both of these cases affirm what may be emotional distress damages, but their procedural posture makes them of dubious precedential value. In Hall, the insurer failed to object to jury instructions that could be read as permitting recovery for mental anguish. Hall, 368 N.W.2d at 253. In Horton, the court affirmed the award of $5000 in unspecified compensatory damages...
a statutory cause of action based on conduct that would otherwise be considered bad faith.\textsuperscript{98}

Although this variety of approaches makes accurate generalizations difficult, several interesting patterns emerge:

- The most common approach is the most permissive one. Courts from nine states allow emotional distress damages as a routine part of damages for bad faith.\textsuperscript{99}
- The majority of jurisdictions addressing the issue allow emotional distress damages under some circumstances. In addition to the nine states that generally allow emotional distress damages, another seven states allow them if the plaintiff has substantial other harm (three states),\textsuperscript{100} if the defendant has a bad state of mind (two states),\textsuperscript{101} or if such damages are within the scope of foreseeable damages (two states).\textsuperscript{102}
- A minority of states has rejected the availability of emotional distress damages outright.\textsuperscript{103}

because the insurer failed to provide an adequate record for review. \textit{Horton}, 794 P.2d at 849.

\textsuperscript{98} See, e.g., \textit{Time Ins. Co. v. Burger} 712 So. 2d 389 (Fla. 1998) (holding that emotional distress damages are available under a statute authorizing first-party bad faith claim against a health insurer).

\textsuperscript{99} Alabama, Arizona, Colorado, Montana, Nebraska, North Dakota, Oklahoma, Rhode Island, and Texas. \textit{See supra} note 93.

\textsuperscript{100} California, Wisconsin, and Wyoming. \textit{See supra} note 95. One state, Colorado, has authority that requires substantial property or economic loss as a precondition to emotional distress damages, \textit{see} Farmers Group, Inc. \textit{v. Trimble}, 768 P.2d 1243 (Colo. Ct. App. 1988), but also has authority that allows emotional distress damages generally, \textit{see} Ballow \textit{v. PHICO Ins. Co.}, 878 P.2d 672, 677 (Colo. 1994). For purposes of these generalizations, I included Colorado as a state in the most liberal category.

\textsuperscript{101} Florida and New Jersey. \textit{See supra} note 96.

\textsuperscript{102} Michigan and Utah. \textit{See supra} note 97.

\textsuperscript{103} The number of states which have rejected emotional distress damages is between four and six. Only four states – Delaware, New Hampshire, New York and Oregon – have rejected emotional distress damages unequivocally. \textit{See} Tackett \textit{v. State Farm Fire & Cas. Ins. Co.}, 653 A.2d 254 (Del. 1995); Lawton \textit{v. Great S.W. Fire Ins. Co.}, 392 A.2d 576, 581-82 (N.H. 1978); DiBlasi \textit{v. Aetna Life & Cas. Ins. Co.}, 147 A.D.2d 93 (N.Y. 1989); Farris \textit{v. U.S. Fid. & Guar. Co.}, 587 P.2d 1015 (Or. 1978). Another three states – Michigan, New Jersey, and Utah – have rejected emotional distress damages, but in dicta have stated that such damages would be permissible under some circumstances. In Michigan, such damages may be available if the facts show they “can ‘reasonably be said to have been in contemplation of the parties at the time the contract was made.’” \textit{Roberts v. Auto-Owners Ins. Co.}, 374 N.W.2d 905, 907 n.5 (Mich. 1985). Similarly, in Utah consequential damages are those “reasonably within the contemplation of, or reasonably foreseeable by, the parties,” and may include emotional distress damages in “unusual cases.” \textit{Beck v. Farmers Ins. Exch.}, 701 P.2d 795, 802 (Utah 1985) (noting that “in unusual cases, damages for mental anguish might be provable”). In New Jersey, emotional distress damages are treated similar to punitive damages and are only available in “egregious circumstances.” \textit{Pickett v. Lloyd’s}, 621 A.2d 445, 455 (N.J. 1993).

Although the statements made by the supreme courts in Michigan and Utah were clearly dicta, two appellate court opinions affirm damages awards that appear for emotional distress, though both arise out of procedural postures that undercut the strength of those holdings. \textit{See supra} note 97 (discussing Hall and Horton).
B. Crisci's Contribution

The doctrinal uncertainty of first-party bad faith and the related availability of emotional distress damages makes it harder to gauge Crisci's contribution, but it is nonetheless clear that Crisci played a major role in the development of the law regarding emotional distress damages in bad faith cases. Crisci's influence was both direct and indirect. It directly influenced development of the doctrine by providing legal authority for courts adopting a rule allowing emotional distress damages, or, in some cases, by providing authority for the case upon which a present case relied in adopting the rule. In addition, Crisci indirectly influenced the development of the doctrine by providing a context for consideration of the issues. This context sometimes resulted in the adoption of a compromise approach to emotional distress damages.

1. Direct Influence

A good example of the direct influence of Crisci resulting in the adoption of the most liberal approach to emotional distress damages is the case Farr v. Transamerica Occidental Life Insurance Co. In that case, the plaintiffs alleged that their insurer had improperly failed to pay benefits due under a group health insurance policy. The jury awarded $13,117.20 in compensatory damages, and $70,000 in punitive damages, even though the unpaid benefits were only $2848.45. On appeal, the insurer claimed that the trial court erred in instructing the jury that it was entitled to award plaintiffs compensation for their emotional distress. The court of appeals rejected that argument and affirmed the damages instruction:

We conclude that damages for emotional distress may be awarded even though the defendant did not intentionally cause the distress and even though the distress was not severe. The concern in a bad faith case is "with mental distress resulting from a substantial invasion of property interests of the insured and not with the independent tort of intentional infliction of emotional distress." The primary reason for precluding recovery of mental distress damages "is that to permit recovery of such damages would open the door to fictitious claims." In the case of bad faith, however, "where . . . the claim is actionable and has resulted in substantial damages apart from those due to mental distress, the danger of fictitious claims is reduced . . . ." The rationale for allowing damages for emotional distress without a showing of outrageous conduct or severe distress, once a loss of property is proven, is sound.

Crisci also directly influenced the development of the law through other cases. In Braesch v. Union Insurance Co., for instance, the Nebraska Supreme Court held that mental distress damages are available for the tort of

105 Id. at 378-79.
106 "The trial court instructed the jury that it could award damages for the [plaintiffs'] anxiety, emotional distress and embarrassment." Id. at 382. The insurer claimed that plaintiffs were only entitled to such an instruction if there was evidence of intentional infliction of emotional distress and outrageous conduct. Id.
bad faith. Even though the court did not cite to Crisci, the cases it relied upon included two that can be traced back to Crisci. The Nebraska Supreme Court relied upon Chavers v. National Security Fire & Casualty Co., Rawlings v. Apodaca, and Bibeault v. Hanover Insurance Co. Although Chavers does not trace directly back to Crisci, both Rawlings and Bibeault do. The Rawlings opinion relied upon Farr discussed above, and Bibeault relied upon Christian v. American Home Assurance Co., which relied upon Crisci.

In these two examples, the courts followed Crisci and adopted the most liberal approach to emotional distress damages. Crisci also directly influenced the adoption of the compromise approach that requires substantial other damages as a precondition to emotional distress damages. This has been the approach of the California courts following Crisci. An example of a court following Crisci for this approach outside of California is Farmers Group v. Trimble. That case was an appeal from a decision after a remand to address

109 Id. at 778.
113 In dicta and without citation to authority, the Alabama Supreme Court observed: "The elements of the tort of bad faith may be proved, as with other intentional torts, by circumstantial as well as direct evidence. Recoverable damages may include mental distress and economic loss." Chavers, 405 So. 2d at 7.
115 577 P.2d 899 (Okla. 1977). Relying on Christian, the Rhode Island Supreme Court reasoned: "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." Bibeault, 417 A.2d at 319. Although the court did not rely on Crisci for this point, it did cite to Crisci in another part of the opinion. See id. (noting that courts recognized a "well-established duty of an insurer in the context of liability insurance to act reasonably and in good faith in settling third-party claims against insureds").
116 After quoting an extensive passage from Gruenberg v. Aetna Insurance Co., 510 P.2d 1032 (Cal. 1973), that relied upon Crisci, the Oklahoma Supreme Court held: "We approve and adopt the rule that an insurer has an implied duty to deal fairly and act in good faith with its insured and that the violation of this duty gives rise to an action in tort for which consequential and, in a proper case, punitive, damages may be sought." Christian, 577 P.2d at 904. It should be noted that Christian did not address the issue of emotional distress damages, but has been construed to have included such damages as part of general tort damages. See Coble v. Bowers, 809 P.2d 69, 73 (Okla. Ct. App. 1990) (finding that "emotional distress caused by a willful, actionable tort is recoverable, even absent physical injury, if it is the natural and probable consequence of the tortious act" and that "[m]ental distress is recognized as an ordinary and natural result of a failure of insurance").

However, there is some California authority that might support the more liberal approach to emotional distress damages. See, e.g., Silberg v. Cal. Life Ins. Co., 521 P.2d 1103, 1109 (Cal. 1974) ("Violation of the duty of the insurer sounds in tort, we held, and an insured may recover for all detriment resulting from such violation, including mental distress."),
a bad faith counterclaim. The jury awarded $170,000 in compensatory damages,\(^\text{119}\) and the insurer appealed, arguing that emotional distress damages should not have been awarded because the plaintiff failed to prove intent to cause severe emotional distress.\(^\text{120}\) In affirming the award, the court adopted a formulation nearly identical to that of the California Supreme Court in *Crisci*. The Colorado Court of Appeals concluded: "emotional distress is recoverable as an element of damages in an action for bad faith breach of insurance contract when the emotional distress results from substantial property or economic loss proximately caused by the insurer’s conduct."\(^\text{121}\)

2. *Indirect Influence*

In addition to providing authority to rely upon, *Crisci* also provided a context for addressing the request for emotional distress damages. Some courts that chose not to follow *Crisci* responded to its approach and reasoning by adopting a compromise approach to emotional distress damages.

One example of a compromise approach adopted in partial response to *Crisci* is the case of *Anderson v. Continental Insurance Co.*,\(^\text{122}\) decided by the Wisconsin Supreme Court in 1978. In that case, the court held that policyholders had a tort claim against their insurer for bad faith refusal to pay a claim owing under a homeowners policy.\(^\text{123}\) Although it did not specifically address the availability of emotional distress damages in the claim before it, the court made some general comments about emotional distress damages in bad faith cases.\(^\text{124}\) In the course of these comments, the court noted that two California cases\(^\text{125}\) (which relied upon *Crisci*)\(^\text{126}\) considered emotional distress damages appropriate where the plaintiffs suffered substantial damages beyond simple breach of the contract. The court rejected this approach, however, and concluded: "[a] recovery for emotional distress caused by an insurer’s bad faith

\(^{119}\) *Id.* at 1245.

\(^{120}\) *Id.* at 1246.

\(^{121}\) *Id.* The key passage in *Crisci* was:

We are satisfied that a plaintiff who as a result of a defendant's tortious conduct loses his property and suffers mental distress may recover not only for the pecuniary loss but also for his mental distress. No substantial reason exists to distinguish the cases which have permitted recovery for mental distress in actions for invasion of property rights. The principal reason for limiting recovery of damages for mental distress is that to permit recovery of such damages would open the door to fictitious claims, to recovery for mere bad manners, and to litigation in the field of trivialities. Obviously, where, as here, the claim is actionable and has resulted in substantial damages apart from those due to mental distress, the danger of fictitious claims is reduced, and we are not here concerned with mere bad manners or trivialities but tortious conduct resulting in substantial invasions of clearly protected interests.


\(^{122}\) *Anderson v. Cont’l Ins. Co.*, 271 N.W.2d 368 (Wis. 1978).

\(^{123}\) *See id.* at 371.


\(^{126}\) *See Gruenberg*, 510 P.2d at 1041; *Silberg*, 521 P.2d at 1108-09.
refusal to pay an insured's claim should be allowed only when the distress is severe and substantial other damage is suffered apart from the loss of the contract benefits and the emotional distress."127

Another example can be seen in the case of Beck v. Farmers Insurance Exchange,128 where the Utah Supreme Court recognized a claim for bad faith, but one that was founded on contract rather than tort.129 Although the contract approach in some jurisdictions precludes the award of emotional distress damages,130 the Utah Supreme Court went out of its way to explain that contract damages could include emotional distress damages. The court noted that contract damages include those which are foreseeable, and that "it is axiomatic that insurance frequently is purchased not only to provide funds in case of loss, but to provide peace of mind."131 The court concluded: "we find no difficulty with the proposition that, in unusual cases, damages for mental anguish might be provable."132

In reaching this conclusion, the Utah Supreme Court relied upon the dissent of Justice Williams in Kewin v. Massachusetts Mutual Life Insurance Co.133 The majority in that case held that a policy holder could not recover emotional distress damages for an insurer's failure to pay disability benefits due under an insurance policy.134 The dissent argued that emotional distress damages should be available even under a contract theory so long as those damages were within the scope of foreseeability.135 Justice Williams noted that other jurisdictions permitted emotional distress damages, and cited Crisci in support.136

This discussion has shown that Crisci had substantial influence, both direct and indirect, on the development of the law concerning emotional distress damages for insurance bad faith conduct. It provided authority for cases to allow emotional distress damages. Although some cases carefully followed Crisci's requirement for substantial property or economic damages as a precondition to emotional distress damages, others went further than Crisci and made such damages more generally available. In addition, Crisci provided a legal context to which other courts responded. That context encouraged some courts to concede that even if emotional distress damages were not generally available, under some circumstances they should be available even using a breach of contract theory for bad faith claims.

127 Anderson, 271 N.W.2d at 378.
129 Id. at 798-99.
130 See supra note 94 and accompanying text.
131 Beck, 701 P.2d at 802.
132 Id.
134 Kewin, 295 N.W.2d at 55.
135 Id. at 62-64.
136 Id. at 64-65.
IV. Normative Arguments for Emotional DistressDamages

Although *Crisci* has had a significant influence on the availability of emotional distress damages, it still has the potential for further influence. By my count, only twenty states have addressed the issue of emotional distress damages for insurance bad faith claims, leaving the issue open in a majority of states. In addition, the doctrine may continue to evolve in the twenty states that have addressed the issue. Courts in those states may clarify the law or choose to limit previous decisions as mere dicta. Furthermore, courts taking conservative approaches to emotional distress damages in first party cases may choose to take a more liberal approach in cases involving third-party bad faith. Most of the cases decided after *Crisci* addressing the emotional distress issue involve first party insurance, which is less likely to give rise to a tort claim for bad faith. As a result, emotional distress damages are less likely to be awarded. But because third-party bad faith is generally regarded as a tort, those jurisdictions limiting emotional distress damages for first-party bad faith may choose to allow them in the third-party context.

Because the law is not yet settled on this issue, I take this opportunity to make normative arguments in support of emotional distress damages. I believe that *Crisci* correctly decided to permit emotional distress damages, but that it should not have limited such damages to cases where the plaintiff has substantial property or economic damages. In other words, I endorse the most liberal approach for emotional distress damages in bad faith cases and maintain that they should be routinely available. *Crisci's* limitation on emotional distress damages was probably the product of an effort to fit emotional distress damages within the existing doctrinal framework. Although California courts continue to limit the availability of emotional distress damages to some degree, other jurisdictions that initially followed *Crisci* have subsequently dropped the limitation, which I support as the optimum approach.

A. Emotional Distress Damages Should Be Permitted to Compensate Victims

Emotional distress damages should be routinely available in bad faith cases to provide full compensation to the plaintiff. This is true regardless of

\[137\text{ See supra notes 99-103. Getting an accurate count is complicated by the fact that emotional distress damages might be permitted in a bad faith case under either the tort of intentional infliction of emotional distress, or perhaps even as part of a negligence claim. See supra text accompanying notes 89-92.}\]

\[138\text{ For examples of statements of dicta, see supra notes 103 and 113.}\]

\[139\text{ See supra note 69.}\]

\[140\text{ See supra note 117.}\]

\[141\text{ For example, the Colorado Court of Appeals initially followed *Crisci* quite literally. See Farmers Group, Inc. v. Trimble, 768 P.2d 1243, 1246 (Colo. Ct. App. 1988) (holding that "damages for emotional distress may properly be awarded upon a showing of substantial property or economic loss"). However, the Colorado Supreme Court characterized the rule more liberally. See Ballow v. PHICO Ins. Co., 878 P.2d 672, 677 (Colo. 1994) (stating that "an insured suing under the tort of bad faith breach of an insurance contract is entitled to recover damages based upon traditional tort principles of compensation for injuries actually suffered, including emotional distress").}\]
whether you use a tort or contract theory for bad faith. Under tort theory, damages are supposed to fully compensate the victim for damages caused by the tort.\textsuperscript{142} Under contract theory, damages are to put the party in the position he or she would have been if the contract had not been breached.\textsuperscript{143} Both of these theories justify emotional distress damages for bad faith breach of an insurance policy. It is generally recognized that people buy insurance for "peace of mind."\textsuperscript{144} As a result, when an insurer in bad faith fails to live up to the obligations under an insurance policy, it is foreseeable that instead of peace of mind, the policyholder will suffer mental distress.\textsuperscript{145} This mental distress is just as much a part of the policyholder's damages as is pain and suffering for the victim of a personal injury tort,\textsuperscript{146} or lost profits for the victim of a breach of

\textsuperscript{142} See, e.g., Reimbursement (Second) of Torts § 901 cmt. a (1977) ("the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort."); id. § 903 cmt. a ("compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed"); Erlich v. Menezes, 981 P.2d 978, 982 (Cal. 1999).

\textsuperscript{143} See, e.g., Restatement (Second) of Contracts, Ch. 16, topic 2 Introductory Cmt. (1979) ("[T]he initial assumption is that the injured party is entitled to full compensation for his actual loss."); id. § 347 cmt. a (1979) ("[C]ontract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed."); Reynolds Metals Co. v. Westinghouse Elec. Corp., 758 F.2d 1073 (5th Cir. 1985); Nat'l Chain Co. v. Campbell, 487 A.2d 132, 135 (R.I. 1985) ("[T]he underlying rationale in breach-of-contract actions is to place the innocent party in the position in which he would have been if the contract had been fully performed."). This basic approach goes back to the historic case of Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (K.B. 1854).


\textsuperscript{145} One commentator argued that the wrongful denial of benefits is similar to the sixteenth most stressful event on the Social Readjustment Rating Scale, one place ahead of death of a close friend. Tartaglio, supra note 144, at 1364-65. The original authors of \textit{Appleman on Insurance Law and Practice} go a little further, contending that the emotional distress from wrongful denial of insurance benefits is similar to the shock of learning that one's spouse and children have been killed in an automobile accident. 16A J. \textit{Appleman} & J. \textit{Appleman, Insurance Law And Practice} § 8879 (1981).

\textsuperscript{146} See, e.g., Reimbursement (Second) of Torts § 903, cmt. a (1977) ("[T]he sensations caused by harm to the body or by pain or humiliation are not in any way analogous to a pecuniary loss, and a sum of money is not the equivalent of peace of mind. Nevertheless, damages given for pain and humiliation are called compensatory. They give to the injured person some pecuniary return for what he has suffered or is likely to suffer."); Hoskie v. United States, 666 F.2d 1353, 1357 (8th Cir. 1981); Hancey v. United States, 967 F. Supp. 443, 445 (D. Colo. 1997); Grammer v. Kohlhaas Tank & Equip. Co., 604 P.2d 823, 833
Depriving most or all bad faith victims of emotional distress damages therefore leaves victims with inadequate compensation.

B. Criticisms of Emotional Distress Damages Do Not Apply to the Circumstances of Insurance Bad Faith

A number of arguments have traditionally been used to justify depriving victims of emotional distress damages, but those arguments are inapplicable in the context of insurance bad faith claims. Perhaps most significant of these arguments has been a concern about false and marginal claims. To prevent such claims, tort doctrine has traditionally required that victims have some physical harm or impact as a precondition to emotional distress damages. This requirement ensures that only those who have suffered some real damage can also claim the more ephemeral damages due to emotional distress. Although bad faith victims may not have the traditional physical harm or impact, if they have a claim for bad faith they will have economic damages that will limit recoveries to those who suffer "real" damage. In the case of third-party insurance, this economic damage typically takes the form of a judgment over the policy limits, while in first-party cases it is in the form of a delay or wrongful denial of insurance benefits. In either case the insurer has the ability to avoid the potential for false or marginal claims by simply avoiding bad faith conduct.


149 See Crisci, 426 P.2d at 179 (citing PROSSER, TORTS § 11, at 43 (3d ed. 1964); Sandor & Berry, supra note 87, at 1253-55.

150 See Sandor & Berry, supra note 87, at 1260-62.

151 See id.
Because even the most liberal approach would limit emotional distress damages to those who have suffered other bad faith damages, I believe that the real concern behind courts’ reluctance to allow such damages is the total exposure faced by the insurance industry. In other words, instead of being worried about false or marginal claims, I suspect that courts are really worried about the number of potential claims, the associated amount of damages, and perhaps the risk of exaggerated damages.\(^\text{152}\) To put it bluntly, courts are concerned that routinely allowing emotional distress damages would add tens of thousands of dollars in damages to thousands of cases, which in turn would increase the cost of insurance for all policyholders.\(^\text{153}\) While this might be justified in the case of “hard” or “real” damages, emotional distress damages are sufficiently ephemeral that courts are concerned that juries, which are viewed as being subject to emotional influence, may award more in excessive damages in too many cases.

Even assuming that juries will award excessive amounts for emotional distress, however, this concern does not justify limiting such damages in light of the circumstances of bad faith litigation. The concern about the total amount of emotional distress damages presumes that they will be awarded in most bad faith cases. In reality, however, the total number of bad faith cases that will reach judgment or even settlement probably represents only a small fraction of instances in which bad faith conduct has occurred. There are several reasons for this. First, many, if not most, policyholders are likely to be unaware of the full scope of their legal rights.\(^\text{154}\) Second, many, if not most, insurance claims are likely to be for amounts that are so small that the costs and risks of litigation outweigh the potential returns.\(^\text{155}\) Third, insurance companies have much greater litigation resources and are in a substantially better position to bear the

\(^{152}\) See id. at 1256-57.

\(^{153}\) Cf. Erlich v. Menezes, 981 P.2d 978, 988 (Cal. 1999) (noting that allowing emotional distress damages for construction defects would increase the cost of housing and affect the availability of insurance); Sandor & Berry, supra note 87, at 1256 (noting that courts’ concern that allowing emotional distress damages generally “would give rise to potentially limitless claims”).

\(^{154}\) Although I do not have specific empirical data to support this belief, empirical data shows that policyholders often misunderstand basic insurance coverages and exclusions. See Jeffrey E. Thomas, An Interdisciplinary Critique of the Reasonable Expectations Doctrine, 5 CONN. INS. L.J. 295, 319-23 (1998). If policyholders are mistaken about their rights specified in their insurance policies, it seems likely that they would be unaware of legal rights that are based on common law developments.

\(^{155}\) For example, a comprehensive, national study of automobile injury claims found that ninety-two percent of bodily injury claimants (35,716 out of a total of 38,701) had economic losses of $5000 or less. Less than one percent of bodily injury claimants (358 out of 38,701) had economic losses over $50,000. Insurance Research Council, Injuries in Auto Accidents: An Analysis of Auto Insurance Claims 51 (1999) (data from Figure 5-7). A similar, though somewhat less stark, distribution was found for Personal Injury Protection claims: seventy-nine percent of PIP claimants (15,277 of 19,274) had economic losses of $5000 or less, while less than one percent (168 out of 19,274) had economic losses over $50,000. Id. Many other tort claims are also abandoned or resolved prior to litigation. See Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 Md. L. Rev. 1093, 1099-101 (1996).
risks of litigation. As a result, it is likely that insurers will be able to settle most bad faith cases at a discount from their full litigation value.

C. A Simple Quantitative Model for Evaluating the Impact of Allowing Emotional Distress Damages

Although quantifying the effect of these factors would require substantial empirical research, estimates of their impact can be used to illustrate that the concern about overpayment for emotional distress damages is greatly exaggerated. Let us work with the following simplistic model. Assume that fifty percent of policyholders are aware of their rights, and that of those, another fifty percent have damages that are sufficient to justify the expense, hassle, and risks of bringing a legal action. In addition, assume that seventy-five percent of cases involve insufficient damages to warrant making a legal claim. We will also assume that of those who bring a legal action, ninety percent will compromise their claim prior to trial, and that the compromise will be for eighty percent of the full value of the case. For simplicity, we will assume bad faith claims not worth bringing as lawsuits on average cause $1000 in non-emotional distress damages, but that ones worth bringing cause $50,000 in such damages. We will also assume that emotional distress damages will, on average, be fifty percent of compensatory damages when they are accurate, but when "exaggerated" we will assume that they will, on average, be two times the compensatory damages (or four times higher than when not exaggerated). Finally, let’s work with these assumptions in a set of 1000 bad faith incidents.

157 The conventional wisdom is that “about ninety percent of civil cases settle before trial.” William F. Coyne, Jr., The Case For Settlement Counsel, 14 OHIO ST. J. ON DISP. RESOL. 367, 370 (1999); see also Mary J. Davis, Summary Adjudication Methods in United States Civil Procedure, 46 AM. J. COMP. L. 229, 229 n.2 (1998). Statistics confirm this number. For examples, only 4.9% of tort cases filed in federal court (139 of a total of 2,821) were resolved during or after trial. See Table C-4 Cases Terminated, by Nature of Suit and Action Taken, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2000), available at http://www.uscourts.gov/judbus2000/contents.html. For a more comprehensive discussion of the settlement data, and lack thereof, along with a more complete picture of how tort claims are resolved, see Galanter, supra, note 155.
158 See supra note 157.
159 There is no comprehensive database of emotional distress damages in bad faith cases. Reported appellate decisions of bad faith cases show a substantial range of possible emotional distress damages. Sometimes they are a proportion of other compensatory damages. See, e.g., Berglund v. State Farm Mut. Auto. Ins. Co., 121 F.3d 1225, 1227 (8th Cir. 1997) (plaintiffs awarded $515,831.42 for an excess judgment and interest and $4000 for emotional distress); Crisci v. Sec. Ins. Co., 426 P.2d 173, 175 (Cal. 1967) ($25,000 in emotional distress damages compared to $91,000 in other compensatory damages); Waller v. Truck Ins. Exch., 32 Cal. Rptr. 2d 692, 697 (Ct. App. 1994) (plaintiff awarded emotional distress damages of $250,000 and other compensatory damages of $705,461.53); Bibeault v. Hanover Ins. Co., 417 A.2d 313, 315 (R.I. 1980) (plaintiff awarded $15,000 for uninsured-motorist benefits and another $20,000 in compensatory damages that included emotional distress). On the other hand, sometimes emotional distress damages are substantially greater than other compensatory damages by as much as a factor of four or five. See, e.g., Ace v. Aetna Life Ins. Co., 139 F.3d 1241, 1243 (9th Cir. 1998) (plaintiff awarded $27,009 for the wrongful denial of disability benefits and $100,000 for emotional distress); Clayton v. United Servs.
Using these assumptions, of the 1000 incidents of bad faith, 500 will not be brought because policyholders are unaware of their rights. Of the remaining 500 incidents, 375 do not involve sufficient damages to warrant legal action. That leaves 125 incidents for which suits are filed, of which only 13 proceed to trial. The following table provides a summary:

**Table 1 – Bad Faith Incidents Proceeding to Settlement or Trial**

<table>
<thead>
<tr>
<th>Incidents</th>
<th>Knowledge</th>
<th>Size of claim</th>
<th>Compromise</th>
</tr>
</thead>
<tbody>
<tr>
<td>1000</td>
<td>500 unknown</td>
<td>125 large</td>
<td>13 to trial</td>
</tr>
<tr>
<td></td>
<td>500 known</td>
<td>375 small</td>
<td>112 settled</td>
</tr>
</tbody>
</table>

Now to calculate damages. Under the above assumptions, bad faith occurred in each of the 1000 incidents. In 750 incidents (seventy-five percent), the real damages were only $1000, amounting to a total of $750,000 for those incidents. In the remaining 250 incidents, the damages were $50,000, for a total of $12,500,000 for those incidents. The combined total for non-emotional distress damages in all 1000 cases therefore is $13,250,000. Based on our assumption that emotional distress damages will add another fifty percent, the emotional distress damages for all 1000 incidents would come to $6,625,000. The combined total of both emotional distress and non-emotional distress damages comes to $19,875,000. The following table provides a summary:

**Table 2 – Total Damages from 1,000 Bad Faith Incidents**

<table>
<thead>
<tr>
<th>Incidents</th>
<th>Size of claim</th>
<th>Non-Emotional Distress Damages</th>
<th>Emotional Distress Damages</th>
<th>Total Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>750 small</td>
<td></td>
<td>$ 750,000</td>
<td>$ 375,000</td>
<td>$ 1,125,000</td>
</tr>
<tr>
<td>250 large</td>
<td></td>
<td>$12,500,000</td>
<td>$6,250,000</td>
<td>$18,750,000</td>
</tr>
<tr>
<td>Totals</td>
<td>1000 cases</td>
<td>$13,250,000</td>
<td>$6,625,000</td>
<td>$19,875,000</td>
</tr>
</tbody>
</table>

Auto. Ass’n, 63 Cal. Rptr. 2d 419, 420 (Ct. App. 1997) (plaintiff awarded $429,310 in compensatory damages of which $400,000 was allotted to emotional distress); Kewin v. Mass. Mut. Life Ins. Co., 295 N.W.2d 50, 52 (Mich. 1980) (reversing jury’s decision to award $75,000 in emotional distress damages in addition to $16,500 due under the insurance policy); Gibson v. W. Fire Ins. Co., 682 P.2d 725, 729-30 (Mont. 1984) (plaintiff awarded damages of $250,000 of which $83,750 was for the excess verdict).

The assumptions used for this simple quantitative model are a generalized average of these outcomes, somewhat discounted by the fact that the higher the emotional distress damages, the more likely it is to be appealed and therefore the less likely it is to be representative of average verdicts. This methodology is my best estimate, though I recognize it is far from scientific. Good data on the size of emotional distress damage awards in bad faith cases obviously could change the outcomes from the model. My point, however, is not to prove that emotional distress damages would not be excessive, but rather that the risk of excessive damages should be discounted by the fact that many claims will not be brought and the fact that of those cases that are brought, most will be compromised.
Not all of these damages would be paid out. Half of the cases will not be brought because the policyholders are unaware of their rights, and of the remaining, only twenty-five percent of the cases are large enough to justify the expense of making a legal claim. Of the 1000 incidents, only 125 of the large claims will be brought. These cases have non-economic damages of $50,000 and emotional distress damages of $25,000, for a total of $75,000 per case. The total damages for all 125 cases amounts to $9,375,000. But this figure is more than what will be paid out because most cases will be settled. Of the 125 cases, 112 (ninety percent) will be settled at an average cost of $60,000 (eighty percent of full value). The settled cases have a combined cost of $6,720,000. The remaining cases (thirteen) that go to trial have the cost of $75,000 per case, for a total of $975,000. The combined total cost for settled and tried cases is $7,695,000. Table 3 provides a summary:

<table>
<thead>
<tr>
<th>Incidents</th>
<th>Compromised</th>
<th>Non-Emotional Distress Damages</th>
<th>Emotional Distress Damages</th>
<th>Total Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>13 tried</td>
<td>$650,000</td>
<td>$325,000</td>
<td>$975,000</td>
<td></td>
</tr>
<tr>
<td>125</td>
<td>$4,480,000</td>
<td>$2,240,000</td>
<td>$6,720,000</td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>$5,130,000</td>
<td>$2,565,000</td>
<td>$7,695,000</td>
<td></td>
</tr>
</tbody>
</table>

These figures show that making insurers liable for emotional distress damages will not result in any overpayment of damages. For 1000 incidents of bad faith conduct, the insurer would make total payments of $7,695,000. This total is $12,180,000 less than the actual damages of $19,875,000. Moreover, the insurers total payment is $5,550,000 less than the non-emotional distress damages in all cases, and is $4,805,000 less than the non-emotional distress damages in just the large cases. Thus, because of the large number of cases that are not brought, the cost of bad faith, even with emotional distress damages, is still substantially less than the damages caused by such conduct. Although our assumptions may not be accurate, the margin is so large that the probability of overpayment by insurers is very low. The following table provides the summary comparison of total cost to total damages:

<table>
<thead>
<tr>
<th>Total Cost</th>
<th>Total Damages</th>
<th>Total Non-Emotional Distress Damages</th>
<th>Total N-ED in Large cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>$7,695,000</td>
<td>$19,875,000</td>
<td>$13,250,000</td>
<td>$12,500,000</td>
</tr>
</tbody>
</table>

We now turn to the consideration of exaggerated emotional distress damages. If we increase the emotional distress damages to two times the non-emotional distress damages, the margin between damages paid and damages suffered will be smaller, but not eliminated. The exaggerated emotional distress damages would only apply to those cases that would be brought, so we need only work with 125 cases from the 1000 bad faith incidents. The non-emotional distress damages would be the same, but instead of having $25,000 in emotional distress damages, we now assume that the damages would be two
times the non-emotional distress damages ($50,000), or $100,000 in each case. For those thirteen cases that are tried, we assume that full $100,000 would be paid, which pushes the total emotional distress damages for those cases to $1,300,000. In addition, the emotional distress damages for the settled cases would be eighty percent of $100,000 per case, or $80,000. If that amount is paid in each of the 112 settled cases, the total for those cases comes to $8,960,000. When combined with the non-emotional distress damages, the total cost for all 125 cases would be $15,390,000. The following table is a summary:

**Table 5 – Total Costs with Exaggerated Emotional Distress Damages**

<table>
<thead>
<tr>
<th>Incidents</th>
<th>Compromised</th>
<th>Non-Emotional Distress Damages</th>
<th>Emotional Distress Damages</th>
<th>Total Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>13 tried</td>
<td></td>
<td>$650,000</td>
<td>$1,300,000</td>
<td>$1,950,000</td>
</tr>
<tr>
<td>125</td>
<td>112 settled</td>
<td>$4,480,000</td>
<td>$8,960,000</td>
<td>$13,440,000</td>
</tr>
<tr>
<td>Totals</td>
<td>125 cases</td>
<td>$5,130,000</td>
<td>$10,260,000</td>
<td>$15,390,000</td>
</tr>
</tbody>
</table>

Although these numbers are much closer to the actual damages than the figures without exaggerated emotional distress damages, they are still $4,485,000 less. In other words, even if emotional distress damages are four times more than what we assumed for actual damages (so that, on average, they are two times higher than the non-emotional distress damages), the total cost to the insurance industry would still be less than the damages caused by bad faith conduct in our set of 1000 incidents. This, however, assumes that emotional distress damages are necessary to compensate victims of bad faith. The total cost of these claims (including exaggerated emotional distress damages) exceeds the actual damages in all 1000 cases when emotional distress is entirely excluded from the damages. The exaggerated damages exceed the non-economic damages for all incidents by $2,140,000, and they exceed the non-economic damages in large cases by $2,890,000. The relevant figures are included in the following table:

**Table 6 – Comparison of Total Exaggerated Costs to Total Damages**

<table>
<thead>
<tr>
<th>Total Cost- Exaggerated ED</th>
<th>Total Damages</th>
<th>Total Non-Emotional Distress Damages</th>
<th>Total Non-ED in Large cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>$15,390,000</td>
<td>$19,875,000</td>
<td>$13,250,000</td>
<td>$12,500,000</td>
</tr>
</tbody>
</table>

Although these are sizeable differences, when exaggerated emotional distress damages are considered in the context of all claims, they exceed the total non-emotional distress damages only by a modest proportion. Total costs including exaggerated emotional distress damages only exceed total non-emotional distress damages by 16.15%, and only exceed total non-economic damages by 16.15%. Here is the math: $15,390,000 - $13,250,000 = $2,140,000. $2,140,000 / $13,250,000 = 0.161509434.
damages for large cases incidents by 23.12%.\footnote{Here is the math: $15,390,000 - 12,500,000 = 2,890,000. $2,890,000 / 12,500,000 = 0.2312.} Thus, by exaggerating emotional distress damages by a factor of four, insurers would have to pay less than twenty-five percent over the non-emotional distress damages caused in the worst of the 1000 incidents.

This simple quantitative model can be challenged as making incorrect or unrealistic assumptions, but even with those challenges, it shows that the impact of emotional distress damages is substantially, if not entirely, offset by the circumstances of insurance bad faith litigation. Many bad faith cases will never be brought to court because policyholders are unaware of their legal rights or because the damages are too small to justify the costs and risks of litigation. In addition, even when claims are brought, the insurers' comparative advantages enable them to settle most cases at a discount from their full value. As a result of these circumstances, insurers would have to consistently pay grossly exaggerated emotional distress damages before they would end up paying more in the aggregate than the total damages caused by bad faith conduct.\footnote{A similar argument, though without the model and based on deterrence concerns, was made by Curtis, supra note 148.}

V. Conclusion

Crisci is a landmark insurance bad faith case. It helped to popularize bad faith law, and to develop bad faith law. Although not as obvious, Crisci also initiated a line of cases allowing emotional distress damages for an insurer's bad faith conduct. In this respect, the influence of Crisci is still ongoing. The majority of states have not yet addressed whether emotional distress damages are available for an insurer's bad faith conduct, though many states allow them under some circumstances. Only a handful of states have directly rejected the availability of emotional distress damages in bad faith cases. Of those states that allow emotional distress damages, the most common approach goes further than Crisci and would allow them as a routine element of damages. Other states only allow emotional distress damages in more limited bad faith circumstances.

From a normative standpoint, I have argued that emotional distress damages should be routinely available in bad faith cases. Insurance policies are purchased in significant part to obtain "peace of mind." When an insurer acts in bad faith to deprive a policyholder of benefits due under a policy, emotional distress is foreseeable and, in many cases, likely. As a result, emotional distress damages are necessary in many cases to fully compensate policyholders. The Crisci saga, and its continuing resonance with new generations of law students, tends to emphasize the reasonableness of the view that emotional damages recovery is a necessary component of effective insurance law and regulation.

Continued resistance to emotional distress damages stems from concerns about an insurance company's ability to pay such damages. Courts are concerned about the number of such claims that would be brought and the possibil-
ity of false and exaggerated claims. The circumstances of bad faith litigation, however, show that these concerns are substantially unwarranted. Many bad faith cases will never be brought to court, and most of those brought will be compromised through settlement. A simple quantitative model shows that emotional distress damages are unlikely to overburden insurers. Because so many claims are never brought, insurers in the aggregate are likely to pay less than the full cost of bad faith conduct even if emotional distress damages are consistently grossly exaggerated. The legal system need not wait for more Crisci cases to recognize the utility of emotional distress damages in our system of insurer bad faith law.