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Bad Faith Refusal to Pay Disability Benefits: Should South Carolina Courts Permit Recovery of Future Policy Benefits?

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BAD FAITH REFUSAL TO PAY DISABILITY BENEFITS: SHOULD SOUTH CAROLINA COURTS PERMIT RECOVERY OF FUTURE POLICY BENEFITS?

I. INTRODUCTION

South Carolina recognizes an implied duty of good faith and fair dealing in insurance contracts and allows recovery in tort when an insurer acts in bad faith.[1] In addition to allowing damages within the contemplation of the parties at the time of the contract, tort claims involving bad faith refusal to pay insurance benefits entitle the insured to such damages as compensation for emotional distress that an insurer's unreasonable handling of a claim caused. In actions alleging an insurer's bad faith refusal to pay disability insurance benefits, some jurisdictions award future policy benefits consisting of the present value of future payments to which the insured would be entitled under the policy for as long as the policy provides and the insured's disability exists.[2] However, South Carolina courts have not clarified the nature and scope of consequential damage awards available to the insured in the disability insurance policy context.

Since 2001, the United States District Court for the District of South Carolina has decided two cases dealing with the propriety of awarding future policy benefits as a part of consequential damages in actions stemming from insurers' bad faith refusals to pay disability insurance benefits.[3] In *Wright v. UNUM Life Insurance Co.*, Judge Patrick Michael Duffy followed the reasoning of California courts and impliedly held that the award of future policy benefits is proper.[4] In *University Medical Associates v. UNUM Provident Corp.*, Judge David Charles Norton disagreed and held that, where the court also awards punitive damages, the award

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1. *See* Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 359–60, 415 S.E.2d 393, 396–97 (1992); Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 339–40, 306 S.E.2d 616, 618–19 (1983); Am. Fire & Cas. Co. v. Johnson, 332 S.C. 307, 310–12, 504 S.E.2d 356, 358–59 (Ct. App. 1998) (noting that South Carolina recognizes the tort of bad faith refusal to pay benefits, but refusing to reach the issue of whether the cause of action should extend to "cases which address a bad faith claim in a principal-surety relationship").

2. *See, e.g.*, Hangarter v. Paul Revere Life Ins. Co., 236 F. Supp. 2d 1069, 1088–89 (N.D. Cal. 2002) (holding the insured is entitled to all accrued benefits, as well as future policy benefits, because forcing the insured, who has complied with the terms of the contract, to continue submitting to the insurer's bad faith would be unfair); Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 149 n.7 (Cal. 1979) (holding that the jury can award future policy benefits for breach of the implied covenant of good faith and fair dealing); DeChant v. Monarch Life Ins. Co., 554 N.W.2d 225, 228 (Wis. Ct. App. 1996) (upholding a jury award of future policy benefits in a lump sum against an insurer who acted in bad faith in handling the insured's disability claim). *But see* Austero v. Nat'l Cas. Co., 84 Cal. App. 3d 1, 24 (Cal. Ct. App. 1978) (holding that an award of future policy benefits not due at the time of trial was inappropriate), *overruled by* Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141 (Cal. 1979). The *Austero* court defined future policy benefits as those accruing from the date of the verdict through the last possible date on which the policy would allow for payment. *Id.*

3. Univ. Med. Assocs. v. UNUM Provident Corp., 333 F. Supp. 2d 479 (D.S.C. 2004); Wright v. UNUM Life Ins. Co., C.A. No. 2:99-2394-23 (D.S.C. Aug. 31, 2001).

4. Slip op. at 20–21.

of future policy benefits is speculative and provides a windfall for the insured.[5] Because South Carolina's state appellate courts have not addressed this issue, the two contrary holdings from the federal court still stand and highlight the need for clarification at the state level.

South Carolina courts should not award future policy benefits as damages to insureds prevailing on bad faith tort claims, because such benefits punish the insurer for conduct that has yet to occur. Future policy benefit awards are not fair to the insurer unless the insured proves that the insurer will continue to act in bad faith. Further, the court can award punitive damages in bad faith cases to punish the insurer and deter later misconduct toward the insured. For these reasons, the South Carolina appellate courts should prohibit awards of future policy benefits.

This Comment explores the status of awards of future policy benefits for bad faith refusal to pay insurance benefits. Part II discusses the tort of bad faith refusal to pay insurance benefits and its adoption in South Carolina. Part III examines the current law relevant to future policy benefits awards in South Carolina. Part IV argues that future benefits awards are inappropriate in bad faith insurance cases. This Comment concludes that South Carolina should not allow recovery of future policy benefits in bad faith refusal to pay insurance benefit claims.

II. THE TORT OF BAD FAITH REFUSAL TO PAY INSURANCE BENEFITS

A. California's Recognition of a Tort Action Based on an Insurer's Bad Faith Refusal to Pay a Claim

Generally, first-party bad faith claims arise when the insurer refuses to pay for the insured's own losses or injuries the policy allegedly covered. The insured buys the policy with the expectation that the insurer will promptly pay when a covered loss occurs. As one commentator has noted,

> The benefit for which the insured contracts is the prompt payment of money following submission of a valid claim. When the insurer unreasonably refuses to pay the benefits due under the terms of the contract, the insured is deprived of the essential benefits of the agreement. An unreasonable refusal to pay or delay in paying a valid claim precipitates the precise economic hardship the insured sought to avoid by purchase of the policy. Thus, the whole purpose of insurance is defeated if the insurer can refuse, without justification, to pay a valid claim.[6]

Typically, the insured is facing unfortunate circumstances—being disabled and unable to return to work, having a car damaged and being unable to pay for repairs, or having a house destroyed and being unable to rebuild it. If the insurer refuses to pay a valid claim without a good faith basis for its refusal, the consequences to the insured can be disastrous.

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5. 333 F. Supp. 2d at 477–78.

6. Elizabeth Williams, Annotation, *Cause of Action in Tort for Bad Faith Refusal of Insurer to Pay Claim of Insured*, 10 COA 2d 77, 95 (2003) (citations omitted).

Although the tort of bad faith refusal to pay insurance benefits may grow out of the same occurrence as the breach of contract, the actions are distinct claims with separate remedies.[7] Courts often base the tort of bad faith on the insurer's duty to act in good faith and deal fairly with an insured's claim.[8] Courts also find that the unequal bargaining power between the insured and the insurer justifies protection for the insured in the form of extra-contractual damages.[9] The relationship between the insurer and the insured is such that the insured needs protection from the insurer's arbitrary refusal to pay a valid claim.[10] If the states did not create a recovery in tort, the insured would have little power to deter the insurer's bad conduct.[11] Contract damages are insufficient for deterring bad faith conduct, because the terms of the contract, which the insurer presumably drafted in terms favorable to itself, limit such damages.

California was the first state to recognize an action for an insurer's bad faith refusal to pay first-party benefits.[12] Twenty-five states have since adopted a bad faith cause of action against an insurer.[13]

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7. *See, e.g.*, Tadlock Painting Co. v. Md. Cas. Co., 322 S.C. 498, 502–04, 473 S.E.2d 52, 54–55 (1996) (holding that a bad faith cause of action exists separately from an action for breach of contract and that the breach of an express contractual provision is not a prerequisite to a bad faith claim).

8. *See, e.g.*, Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037 (Cal. 1973) ("This implied obligation requires an insurer to deal in good faith and fairly with its insured in handing an insured's claim against it."); Arnold v. Nat'l County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (recognizing that the duty of good faith and fair dealing exists in insurance contracts).

9. *See, e.g.*, Nichols v. State Farm Mut. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983) ("An insured ordinarily possesses no bargaining power and no means of protecting himself . . . . Absent the threat of a tort action, the insurance company can, with complete impunity, deny any claim they wish . . . ."); *Arnold*, 725 S.W.2d at 167 ("In the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims.").

10. *See* Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74 (1994). Richmond explained the relationships as follows:

> An insurer and its insured, unlike parties to other contracts, may be thought to share a special relationship. This special relationship arises out of the parties' perceived unequal bargaining power and the nature of insurance policies, which potentially allow unscrupulous insurers to exploit their insureds' misfortunes when resolving or settling claims.

Id. at 78.

11. *See, e.g.*, Curry v. Firemen's Fund Ins. Co., 784 S.W.3d 176, 178 (Ky. 1989) (recognizing that disallowing recovery in tort, would "permit[] an insurance carrier to deny payment without any justification, attempt unfair compromise by exploiting the policyholder's economic circumstance, and delay payment by litigation with no greater possible detriment than payment of the amount justly owed plus interest"); *Arnold*, 725 S.W.2d at 167 ("[W]ithout such a cause of action insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed.").

12. *Gruenberg*, 510 P.2d at 1037 (recognizing that the duty of good faith and fair dealing applies to insurance contracts in both first-party and third-party contexts).

13. *See* Chavers v. Nat'l Sec. Fire & Cas. Co., 405 So. 2d 1, 6 (Ala. 1981); State Farm Fire & Cas. Co. v. Nicholson, 777 P.2d 1152, 1156 (Alaska 1989); Noble v. Nat'l Am. Life Ins. Co, 624 P.2d 866, 868 (Ariz. 1981); Aetna Cas. & Sur. Co. v. Broadway Arms Corp., 664 S.W.2d 463, 465 (Ark. 1984); Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1273–74 (Colo. 1985); Buckman v. People Express, Inc., 530 A.2d 596, 599 (Conn. 1987); Best Place, Inc. v. Penn. Am. Ins. Co., 920 P.2d 334, 337 (Haw.

In the California case, *Gruenberg v. Aetna Insurance Co.*, the insured's restaurant burned down, and his insurer refused to pay benefits, because the insured refused to submit to examination under oath about the incident.[14] The insured sued the insurer in tort for breach of the implied duty of good faith and fair dealing.[15] Under California precedent, the duty only existed when the insurer handled claims of third parties against the insured.[16] The *Gruenberg* court extended the duty to claims of the insured.[17] The court concluded that "in every insurance contract there is an implied covenant of good faith and fair dealing . . . . Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort."[18] The court allowed the insured to seek compensatory damages for mental distress if he proved sufficient tortious conduct by the insurer.[19] South Carolina courts adopted *Gruenberg* in 1983 and recognized the same duty of insurers toward insureds in the first-party context.[20]

B. South Carolina's Recognition of Bad Faith Refusal to Pay

South Carolina first recognized a tort action based on a liability insurer's bad faith refusal to settle with a third party in 1933.[21] In *Tyger River Pine Co. v. Maryland Casualty Co.*, an employee suffered permanent injury and sued his employer, Tyger River, for damages.[22] Tyger River, the insured, carried a liability policy whereby Maryland Casualty would indemnify it for damages owed to injured employees.[23] Because Maryland Casualty refused to settle with the employee and then lost at trial, Tyger River paid $2,000 in excess of its policy coverage limits.[24] Knowing that the employee would have settled within policy limits but for Maryland Casualty's refusal, Tyger River sued Maryland Casualty for acting in bad

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1996); White v. Unigard Mut. Ins. Co., 730 P.2d 1014, 1016 (Idaho 1986); Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 519 (Ind. 1993); Dolan v. Aid Ins. Co., 431 N.W.2d 790, 790 (Iowa 1988); *Curry*, 784 S.W.2d at 178; State Farm Fire & Cas. Co. v. Simpson, 477 So. 2d 242, 250 (Miss. 1985); Lipinski v. Title Ins. Co., 655 P.2d 970, 977 (Mont. 1982); Braesch v. Union Ins. Co., 464 N.W.2d 769, 776 (Neb. 1991); United Fire Ins. Co. v. McClelland, 780 P.2d 193, 197 (Nev. 1989); State Farm Gen. Ins. Co. v. Clifton, 527 P.2d 798, 800 (N.M. 1974); Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638, 643 (N.D. 1979); Hoskins v. Aetna Life Ins. Co., 452 N.E.2d 1315, 1319 (Ohio 1983); Christian v. Am. Home Assurance Co., 577 P.2d 899, 904 (Okla. 1978); Bibeault v. Hanover Ins. Co., 417 A.2d 313, 319 (R.I. 1980); *Nichols*, 279 S.C. at 340, 306 S.E.2d at 619; Champion v. U.S. Fid. & Guar. Co., 399 N.W.2d 320, 322 (S.D. 1987); *Arnold*, 725 S.W.2d at 167; Anderson v. Cont'l Ins. Co., 271 N.W.2d 368, 374 (Wis. 1978); McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 861 (Wyo. 1990).

14. 510 P.2d at 1034–35.

15. *Id.* at 1036.

16. *Id.* at 1037.

17. *Id.*

18. *Id.* at 1038.

19. *See id.* at 1040–42.

20. Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 339–40, 306 S.E.2d 616, 618–19 (1983).

21. Tyger River Pine Co. v. Md. Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933).

22. *Id.* at 287, 170 S.E. at 346.

23. *Id.*

24. *Id.* at 287–88, 170 S.E. at 346–47.

faith.[25] The South Carolina Supreme Court examined whether the complaint stated a cause of action in contract or in tort and held that the insurer's unreasonable refusal to settle within the policy limits gave rise to an action in tort.[26] Thus, *Tyger River* opened the door to recovery in both contract and tort when an insurer acts in bad faith.

In 1983 the South Carolina Supreme Court extended the *Tyger River* doctrine to hold an insurer liable in tort for its bad faith refusal to pay its insured's first-party claim.[27] In *Nichols v. State Farm Mutual Auto Insurance Co.*, the insured's automobile was stolen and damaged.[28] Even though Nichols timely filed his claim, State Farm refused to pay and thus delayed Nichols' car repairs for more than seven months.[29] The jury awarded Nichols actual and punitive damages based on State Farm's tortious conduct.[30]

On appeal, the South Carolina Supreme Court faced the issue of whether to "recognize an action for bad faith in an insurer's handling of a claim for first party benefits."[31] The court held that this cause of action and the *Tyger River* doctrine were "merely two different aspects of the same duty."[32] After exploring the public policy reasons underlying this cause of action, the court determined that "[a]n insured ordinarily possesses no bargaining power and no means of protecting himself" from an insurer's refusal to pay benefits under the policy.[33] Without the threat of a tort action, an insurer could deny valid claims and only be liable for contractual damages.[34]

The *Nichols* court joined California in recognizing that an insurance contract contained an "implied covenant of good faith and fair dealing."[35] Finding that public policy demanded additional protection for the insured, the *Nichols* court concluded:

> We hold today that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. Actual damages are not limited by the contract. Further, if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages.[36]

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25. *Id.* at 288–89, 170 S.E. at 347.
26. *Id.* at 291, 170 S.E. at 348.
27. Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983).
28. *Id.* at 338, 306 S.E.2d at 618.
29. *Id.* at 339, 306 S.E.2d at 618.
30. *Id.* at 338, 306 S.E.2d at 618.
31. *Id.* at 339, 306 S.E.2d at 618.
32. *Id.* at 339–40, 306 S.E.2d at 619.
33. Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983).
34. *Id.*
35. *Id.* at 339, 306 S.E.2d at 618 (citing Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1038 (Cal. 1973)).
36. *Id.* at 340, 306 S.E.2d at 619.

Thus, in South Carolina, if an insurer refuses in bad faith to pay an insured's valid claim, the insurer may be liable for actual, consequential, and punitive damages.

III. FUTURE BENEFITS AS CONSEQUENTIAL DAMAGES IN BAD FAITH CASES: THE CURRENT STATE OF THE LAW

In tort actions based on a disability insurer's bad faith in handling its insured's claim, the question remains whether South Carolina appellate courts would allow damages amounting to the present cash value of all future policy benefits. Because South Carolina adopted the tort from California,[37] an assessment of current law relevant to future policy benefits awards in South Carolina should consider the California Supreme Court's allowance of future policy benefits. Additional considerations include South Carolina precedent in contract cases regarding health and disability policies and the two conflicting federal court decisions regarding the availability of future benefits as damages.

A. California's Allowance of Future Benefits in Bad Faith Tort Cases

In a 1979 bad faith case arising from a disability insurance policy, the California Supreme Court allowed the recovery of policy benefits that had accrued, as well as policy benefits that could possibly accrue in the future.[38] In *Egan v. Mutual of Omaha Insurance Co.*, Egan purchased a health and disability insurance policy from Mutual of Omaha.[39] The policy entitled Egan to periodic payments from Mutual of Omaha if he ever became disabled.[40] Egan filed a claim with Mutual of Omaha based on a back injury he suffered in the course of employment that left him completely disabled.[41] When Mutual of Omaha failed to properly investigate Egan's claim and refused to pay disability benefits, Egan sued for compensatory and punitive damages.[42]

The trial court directed a verdict for Egan, and the jury awarded both compensatory and punitive damages, including damages for emotional distress and future policy benefits.[43] On appeal, the California Supreme Court affirmed the award and held that "the jury may include in the compensatory damage award future policy benefits that they reasonably conclude, after examination of the policy's provisions and other evidence, the policy holder would have been entitled to receive had the contract been honored by the insurer."[44] Thus, the California Supreme Court refused to limit recovery to those policy benefits that the insurer owed at the time the insured commenced the action.

In *Hangarter v. Paul Revere Life Insurance Co.*, the United States District Court for the Northern District of California explained the rationale behind

37. *Id.* at 339, 306 S.E.2d at 618.
38. Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 149 n.7 (Cal. 1979).
39. *Id.* at 143.
40. *Id.*
41. *Id.*
42. *Id.* at 144.
43. *Id.* at 144, 149 n.7.
44. Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 149 n.7 (Cal. 1979).

awarding future policy benefits.[45] The *Hangarter* court affirmed the jury's finding that the plaintiff was totally disabled and that the insurer had terminated her benefits under a disability policy in bad faith.[46] In awarding future policy benefits, the *Hangarter* court held that, when an insured complies with the contract and the contract entitles the insured to future benefits, an award for future benefits is appropriate:

> It would be illogical for the court to find as a matter of law that a prevailing plaintiff in a bad faith case should have to continue to submit to the same treatment in order to receive the future benefits of a contract where she has complied with its terms and the insurance company has not.[47]

Like the policy in *Egan*, the policy in *Hangarter* required the insured to submit claims on a regular basis throughout the period of disability in order to continue to receive benefits.[48] The *Hangarter* court concluded that the insurer could not fairly and justly handle the insured's continuing claims.[49] By awarding future benefits, the court circumvented the insurer and allowed the insured to receive the full policy benefits without having to deal directly with the insurer.

B. *South Carolina's Limitation of Damages in Bad Faith Breach of Contract Cases*

In bad faith breach of contract cases involving health or disability insurance claims, the South Carolina Supreme Court limits damages against insurers to those that have accrued at the commencement of the action.[50] For example, in *Odiorne v. Prudential Insurance Co. of America*, the insured was a civil engineer who developed cataracts and was unable to continue working in his field.[51] Odiorne's disability policy required Prudential to make periodic payments to him throughout any period of permanent disability.[52] When Prudential refused to pay his claim, Odiorne sued for breach of contract.[53] The trial court found that Odiorne was permanently disabled and entitled to all benefits under the policy.[54] The South Carolina Supreme Court, noting that Odiorne brought the case in law rather than in

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45. 236 F. Supp. 2d 1069 (N.D. Cal. 2002).
46. *Id.* at 1082.
47. *Id.* at 1089.
48. *See id.* at 1087.
49. *Id.* at 1089.
50. O'Dell v. United Ins. Co. of Am., 243 S.C. 35, 38, 132 S.E.2d 14, 17 (1963); Ellis v. Kansas City Life Ins. Co., 187 S.C. 334, 341–43, 197 S.E. 398, 401–02 (1938) (upholding the rulings in *Odiorne* and *Black*); Odiorne v. Prudential Ins. Co. of Am., 176 S.C. 69, 72, 179 S.E. 669, 670 (1935); Black v. Jefferson Standard Life Ins. Co., 171 S.C. 123, 129, 181 S.E. 617, 619 (1933) (limiting recovery of disability benefits in a breach of contract action to benefits accruing in the period between the insured's filing of proof of his disability and the insured's commencement of the suit).
51. *Odiorne*, 176 S.C. at 70, 179 S.E. at 669.
52. *Id.* at 71–72, 179 S.E. at 670.
53. *Id.* at 70–72, 179 S.E. at 669–70.
54. *Id.* at 70, 179 S.E. at 669–70.

equity, reversed the trial court and held that it could adjudicate "only the rights and liabilities of the parties up to the time of the commencement of the action."[55] Therefore, the court prevented Odiorne from receiving benefits that had not yet accrued when he filed suit.[56]

Thirty-eight years later, the court employed similar reasoning in a contract action based on an insurer's cancellation of a disability policy.[57] In *O'Dell v. United Insurance Co. of America*, William O'Dell alleged that United's wrongful cancellation entitled him to an award of both benefits that had already accrued and benefits that would accrue in the future under his policy.[58] O'Dell sought damages under the theory of anticipatory repudiation by arguing that United had already acted wrongfully and would continue breaching contracts in the future.[59] Citing *Black*, *Odiorne*, and *Ellis*, the court disagreed and held that the lower court properly awarded only the benefits that accrued under the policy up to the time the insured commenced the action.[60]

C. *The Current Split Within the United States District Court for the District of South Carolina Regarding the Availability of Future Benefits in Bad Faith Tort Cases under South Carolina Law*

South Carolina state courts have not faced the issue of whether the state's courts should follow California in awarding future policy benefits for the tort of bad faith refusal to pay insurance benefits. However, two federal judges in South Carolina have considered this issue and have reached opposite conclusions.[61]

In *Wright v. UNUM Life Insurance Co.*, Judge Patrick Michael Duffy impliedly held that future benefits are recoverable when he ruled that an insured could present evidence regarding benefits that would likely come due in the future under his disability insurance policy.[62] This unpublished decision involved the case of an orthodontist who developed rheumatoid arthritis, which prevented him from working in his profession.[63] When Wright made a claim under one of his disability policies, UNUM Life refused to pay.[64] Wright sued UNUM Life for both breach of contract and bad faith refusal to pay on his occupational disability policy.[65]

During pre-trial motions, UNUM Life moved to prohibit Wright's introduction of evidence regarding the value of his future policy benefits at trial.[66] Judge Duffy denied UNUM Life's motion.[67] He explained that "South Carolina has not limited

55. *Id.* at 72, 179 S.E. at 670.
56. Odiorne v. Prudential Ins. Co. of Am., 176 S.C. 69, 72, 179 S.E. 669, 670 (1935).
57. O'Dell v. United Ins. Co. of Am., 243 S.C. 35, 38, 132 S.E.2d 14, 16 (1963).
58. *Id.* at 37, 132 S.E.2d at 15. O'Dell's policy was similar to the policy at issue in *Odiorne*.
59. *Id.*
60. *Id.* at 38, 132 S.E.2d at 16.
61. Univ. Med. Assocs. v. UNUM Provident Corp., 333 F. Supp. 2d 479 (D.S.C. 2004); Wright v. UNUM Life Ins. Co., C.A. No. 2:99-2394-23 (D.S.C. Aug. 31, 2001).
62. Slip op. at 20–21.
63. *Id.* at 1–2.
64. *Id.*
65. *Id.* at 1.
66. *Id.* at 20.
67. *Id.* at 21.

the rule in *Nichols*," which holds an insurer liable for "all consequential damages" stemming from its bad faith refusal to pay an insured's claim.[68] Judge Duffy's decision explicitly stated that consequential damages in tort cases like Wright's include "damages for emotional distress and the present cash value of all future benefits" to which the insured may be entitled, along with "punitive damages if the standard of proof . . . [is] met."[69] The decision further explained that, because South Carolina adopted its law on bad faith from California, South Carolina should follow the California Supreme Court's decision in *Egan* and allow recovery of the value of the future policy benefits.[70]

In response to the insurer's argument that the future policy benefits award would be too speculative, Judge Duffy found that limits on "damages remain in effect and safeguard against speculative awards. Post-trial review of jury awards likewise protect parties from unsupported awards. Thus, non-economic damages and future policy benefits are proper consequential damages for bad faith refusal to pay insurance benefits."[71] Hence, the court allowed Wright to seek future policy benefits at trial.[72]

Three years later in the same federal district, Judge David Charles Norton granted summary judgment for the insurer on the issue of whether the court could award future policy benefits to the insured.[73] In *University Medical Associates v. UNUM Provident Corp.*, Deborah Stanitski, the insured under a disability policy, was a pediatric surgeon and professor at the Medical University of South Carolina.[74] Stanitski suffered severe brain damage resulting from a horseback riding accident and, subsequently, was unable to perform her professional duties.[75] UNUM Provident paid her claim only intermittently and continually requested that she provide additional information regarding her disability.[76] After UNUM Provident refused several times to pay the benefits periodically due to her, Stanitski and her employer, University Medical Associates, filed suit for breach of contract, fraud, breach of the duty of good faith and fair dealing, and unfair trade practices.[77]

In opposing UNUM Provident's motion for summary judgment, Stanitski argued that she was entitled to "the entire value of the policy, including the [present] value of future benefit payments."[78] Her rationale was that the insurer's bad faith deprived her of "peace of mind" and that, if the court did not award the future benefits, she would be put at the mercy of the insurer.[79] In support of her argument, Stanitski cited *Nichols*, *Egan*, and *Wright*.[80]

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68. Wright v. UNUM Life Ins. Co., C.A. No. 2:99-2394-23, slip op. at 20 (D.S.C. Aug. 31, 2001).
69. *Id.*
70. *Id.*
71. *Id.* at 21.
72. *Id.*
73. Univ. Med. Assocs. v. UNUM Provident Corp., 333 F. Supp. 2d 479 (D.S.C. 2004).
74. *Id.* at 481.
75. *Id.* at 481–82.
76. *Id.* at 482.
77. *Id.*
78. *Id.* at 486.
79. Univ. Med. Assocs. v. UNUM Provident Corp., 333 F. Supp. 2d 479, 487 (D.S.C. 2004).
80. *Id.*

In granting UNUM Provident's summary judgment motion, Judge Norton explained that, even though the case sounded in tort rather than contract, the tort itself was "necessarily connected with the contract and, as such, the cause of action retain[ed] qualities of both."[81] As a result, Judge Norton applied the damage-limiting principle of the two previously-discussed South Carolina contract cases, *Odiorne* and *O'Dell*, and noted that awarding future benefits under the policy would have been "a tricky process bordering on speculation."[82] Further, the decision explained that the threat of punitive damages would more properly punish the insurer for its bad conduct toward the insured:

> [A]warding future benefits for these damages would essentially be a punishment inflicted on [a] defendant for acting in bad faith. While bad faith may warrant such punishment, it would seem more prudent to inflict the punishment under the proper heading of punitive damages rather than allowing the recovery of future benefits for "peace of mind."[83]

Judge Norton limited his holding, however, to "the narrow context of the instant case" and did not provide further clarification of the propriety of future policy benefits recovery in South Carolina.[84] Judge Duffy and Judge Norton merely anticipated what the South Carolina Supreme Court might do in a similar situation. Their conflicting opinions may lead to further confusion in the state.

IV. THE INAPPROPRIATENESS OF FUTURE BENEFITS AWARDS IN SOUTH CAROLINA BAD FAITH DISABILITY INSURANCE CASES

Consequential damages in bad faith insurance cases may include emotional distress damages, attorney's fees, and—some would argue—the present value of the future policy benefits.[85] Courts should limit consequential damages, however, to those damages which can "be proved with reasonable certainty . . . . [C]onsequential losses must have been realized or must be likely to be realized in the future."[86] Given this general rule, future policy benefits awards are appropriate only if the insured can show with reasonable certainty that ongoing losses are likely to occur as a result of continued bad faith on behalf of the insurer. The recurrence of the insured's losses would be based upon three conditions: the insured's remaining disabled, the insured's remaining alive,[87] and the insurer's continued bad faith. Thus, to recover future benefits under this standard, an insured would not

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81. *Id.*

82. *Id.* (citing O'Dell v. United Ins. Co., 243 S.C. 35, 132 S.E.2d 14 (1963); Odiorne v. Prudential Ins. Co. of Am., 176 S.C. 69, 179 S.E. 669 (1935)).

83. *Id.*

84. *Id.* at 488.

85. *See* Wright v. UNUM Life Ins. Co., C.A. No. 2:99-2394-23 (D.S.C. Aug. 31, 2001); Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 149 n.7 (Cal. 1979); Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983).

86. DAN B. DOBBS, LAW OF REMEDIES § 3.4, at 234 (2d ed. 1993).

87. *See* Austero v. Nat'l Cas. Co., 84 Cal. App.3d 1, 24 (1978).

only have to show that the insurer was likely to continue to exercise bad faith in the future, but would also have to estimate the duration of the disability and, perhaps, the remaining years of such insured's life.

The jury may decide the likely duration of the insured's disability based on expert medical testimony.[88] In addition, expert witnesses may testify about the insured's predicted lifespan by using actuarial tables and by explaining how the disability affects the insured's overall health.[89] While the insured may be able to prove two elements with reasonable certainty, proving the likelihood of the insurer's continuing bad faith conduct would be more difficult. As a practical matter, the defendant-insurer is unlikely to continue mistreating the plaintiff-insured if it knows that the insured is likely to sue again upon any further mistreatment. Thus, proving by a preponderance of the evidence that the insurer will engage in continuing bad faith will be virtually impossible.

Further, the fact that the future policy benefits compensate the insured for behavior that has not yet occurred brings forth due process concerns and issues of fairness. Forcing an insurer to defend the nature of acts it has not yet committed under penalty of being liable for the current value of all possible policy benefits seems fundamentally unfair. The insurer has not committed a tort against the insured with respect to future benefits, because the duty to pay those benefits has not yet arisen. In the absence of a duty to pay, the insurer has done no wrong and cannot be deemed liable to the insured.

Moreover, if the court feels inclined to punish the insurer by requiring payment of more than the accrued damages under the policy, then punitive damages—rather than future benefits—are the appropriate remedy.[90] Punitive damages are "extracompensatory" in the sense that courts impose such damages to "punish or deter extreme departures from acceptable conduct."[91] Punitive damages are appropriate where the defendant acted with aggravated conduct "coupled with a bad state of mind involving malice or at least a reckless disregard for the rights of others."[92] In South Carolina, to recover punitive damages, an insured must show that the insurer's actions were "willful or in reckless disregard of the insured's rights."[93] If the insured can show that the insurer breached its duty of good faith and fair dealing, then it should not be problematic to prove reckless disregard.

V. CONCLUSION

Awards of future damages are difficult to calculate, inherently unfair, and serve no purpose that punitive damages awards do not already accomplish. While insureds deserve compensation for the losses they suffer at the hands of the insurer, courts should not require insurers to pay for wrongs they have not yet committed.

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88. *See* 31A AM. JUR. 2D, *Expert and Opinion Evidence* § 242 (2002) (discussing the use of experts for predicting lifespan).

89. *Id.*

90. *See* Univ. Med. Assocs. v. UNUM Provident Corp., 333 F. Supp. 2d 479, 487 (D.S.C. 2004).

91. DOBBS, *supra* note 86, § 3.11(1), at 310.

92. *Id.* at 311.

93. Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983).

Therefore, South Carolina courts should extend their prohibition against awards of future benefits in contract cases to the bad faith tort context.[94]

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94. *See* O'Dell v. United Ins. Co., 243 S.C. 35, 132 S.E.2d 14 (1963); Ellis v. Kansas City Life Ins. Co., 187 S.C. 334, 197 S.E. 398 (1938); Odiorne v. Prudential Ins. Co. of Am., 176 S.C. 69, 179 S.E. 669 (1935); Black v. Jefferson Standard Life Ins. Co., 171 S.C. 123, 171 S.E. 617 (1933).