Emotional Distress Damages and Breach of Contract: A New Approach

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Under traditional contract law, emotional distress damages from a breach of contract are unavailable unless the contract can be characterized as "personal." Courts have produced several conflicting interpretations of what constitutes a personal contract. This Article discusses the defects in current approaches and proposes a new test for awarding emotional distress damages in breach of contract cases. The test focuses on those aspects of the contract — emotional events, objects, or interests — that would make emotional distress damages foreseeable at the time of contract formation. The Article also proposes concrete limits on the availability of emotional distress damages in commercial cases.

INTRODUCTION

This Article proposes a new test for determining when courts should compensate for emotional distress[1] in breach of contract cases. Under this test, emotional distress damages are available if, at the time of contracting, the promisor can foresee that emotional distress will flow from

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[1] Alternatively called mental anguish, *see, e.g.*, B & M Homes, Inc. v. Hogan, 376 So. 2d 667, 670 (Ala. 1979); Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979); mental distress, *see, e.g.*, Kewin v. Massachusetts Mut. Life Ins. Co., 409 Mich. 401, 415, 295 N.W.2d 50, 52 (1980); mental suffering, *see, e.g.*, Smith v. Hoyer, 697 P.2d 761, 764 (Colo. Ct. App. 1984); Guerin v. New Hampshire Catholic Charities, Inc., 120 N.H. 501, 506, 418 A.2d 224, 227 (1980); aggravation and inconvenience, *see, e.g.*, Meador v. Toyota, 332 So. 2d 433, 437 (La. 1976); and frustration, *see, e.g.*, Jarvis v. Swan Tours, [1973] 1 Q.B. 233, 237, [1973] 1 A11 E.R. 71, 74.

the breach. Although this is the traditional *Hadley v. Baxendale*[2] rule, current applications of the rule fail because they either sweep so broadly that courts may award limitless damages, or so narrowly that courts may deny redress in deserving cases. The problem is identifying the cases in which the reasonable expectations of both contracting parties would permit emotional distress damages.

Consider this example involving the construction of a new home.[3] The house is built on a concrete slab. A hairline crack develops in the slab and eventually widens and extends through the whole house. The builder does not repair the crack and it turns out that the crack cannot be repaired at all. The homeowner suffers emotional distress as well as other damage and brings suit. Although many factors determine the outcome, such as the breaching party's conduct[4] and the severity and valuation of the distress suffered,[5] the major question is the availability of emotional distress damages in this type of contract.

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[2] 9 Ex. 341, 156 Eng. Rep. 145 (1845).

[3] This example is based on the facts of B & M Homes, Inc. v. Hogan, 376 So. 2d 667 (Ala. 1979). *See infra* text accompanying notes 78-88.

[4] A breach of contract cause of action is often combined with other theories based on the conduct of the party, *i.e.* torts. *See, e.g.*, Quigley v. Pet, Inc., 162 Cal. App. 3d 877, 208 Cal. Rptr. 394 (1984) (tortious interference with business relations, intentional infliction of emotional distress, tortious breach of covenant of good faith and fair dealing); Trimble v. City & County of Denver, 697 P.2d 716 (Colo. 1985) (malicious interference with contractual rights, fraud, intentional abuse of administrative power); Harsha v. State Sav. Bank, 346 N.W.2d 791 (Iowa 1984) (tortious interference with business relationships, intentional infliction of severe emotional distress). Historically, courts intertwined contract and tort law, using *Hadley* to limit more extensive tort damages. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 53, 55 (1888); Bolla, *Contort: New Protector of Emotional Well-Being in Contract?*, 19 WAKE FOREST L. REV. 561, 562 (1983); Fridman, *The Interactions of Tort and Contract*, 93 L.Q. REV. 422, 448 (1977); Holyoak, *Tort and Contract After* Junior Books, 99 L.Q. REV. 591, 591 (1983); O'Connell, *The Interlocking Death and Rebirth of Contract and Tort*, 75 MICH. L. REV. 659, 660-61 (1977); *see also* G. GILMORE, THE DEATH OF CONTRACT 87-103 (1974); B. REITER & J. SWAN, STUDIES IN CONTRACT LAW 236-37 (1980).

[5] Until recently, courts required emotional distress claims to be accompanied by physical illness. *See* Westervelt v. McCullough, 68 Cal. App. 198, 209, 228 P. 734, 738 (1924). For instance, in Allen v. Jones, 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980), a mortuary case, the court considered refusing to uphold damages for emotional suffering because there was no physical illness. However, the court allowed the damages because the defendant negligently mishandled a corpse. *Id.* at 214, 163 Cal. Rptr. at 449-50. Presiding Justice Gardner, in a concurring opinion, criticized the distinction between physical and mental distress as "whimsical" and "needless." *Id.* at 216-17, 163 Cal. Rptr. at 451. In Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 928-31, 616 P.2d 813, 819-21, 167 Cal. Rptr. 831, 837-38 (1980), the court abolished the physical injury requirement.

Under the *Hadley* rule, emotional distress damages are generally considered unforeseeable at the time of contracting and therefore are unavailable.[6] However, an exception is made if a contract is "personal," in the sense of involving the party's mental concerns or feelings.[7] Under one view,[8] a contract for construction of a new home is personal because it deals with a person's comfort and happiness. Under another view,[9] a home construction contract is not personal because it does not involve matters of "life and death."

Both views present problems in determining when emotional distress damages are available. In home construction, the consumer expects to buy the security of a properly constructed home. When breach occurs, the consumer expects compensation for the erosion of her emotional security. The logical extension of this reasoning is that since all contracts bring some measure of emotional security, courts should compensate this lost security upon breach of almost every contract. On the other hand, since contracts are breached in business if a better deal warrants it, the businessperson expects that the law will limit damages to the pecuniary loss involved. The logical extension of this reasoning is that emotional distress damages are never available when an element of "business" is involved. In business cases, the parties share expectations that courts will limit remedies to the monetary losses involved, even though businesspeople certainly suffer aggravation and stress when contracts are breached.

To mesh the expectations of both consumers and businesspeople, it is necessary to focus on the contract's aspects that both parties agree would lead to emotional distress if breached. Also, because some courts settle this difference in viewpoints through futile attempts to ascertain whether a contract is predominantly personal,[10] the inquiry should be shifted to relate more specifically to emotional distress. The proposed test only requires that the contract have an emotional aspect.

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[6] Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51, 56, 87 P. 1093, 1095 (1906). Even if foreseeable, "a gloss on the generality of the rule stated in Hadley v. Baxendale" is to deny recovery for those damages. Valentine v. General Am. Credit, Inc., 420 Mich. 256, 260-61, 362 N.W.2d 628, 630 (1984).

[7] *See infra* text accompanying notes 18-41.

[8] California courts define personal contracts very broadly as dealing with a person's "comfort, happiness or personal welfare." *Westervelt*, 68 Cal. App. at 208-09, 228 P. at 738.

[9] Michigan courts take a very narrow view by defining mental concerns as limited to "life and death." Stewart v. Rudner, 349 Mich. 459, 471, 84 N.W.2d 816, 824 (1957); *accord* Stanback v. Stanback, 297 N.C. 181, 194, 254 S.E.2d 611, 620 (1979).

[10] *See infra* text accompanying notes 65-68 and notes 89-97.

If a contract has an emotional aspect, it is foreseeable that emotional distress will flow from a breach. By examining the events surrounding contract formation as well as the objects involved in the contract, courts should reach less arbitrary decisions. This means that courts cannot preclude emotional distress damages entirely because an element of business is involved, but will award damages commensurate with the emotional aspects known to both parties at the time of contract formation. It is therefore necessary to look for emotional aspects of the contract that are or should be known to businesspeople at the time of contracting. Emotional aspects fall into three categories: (1) emotional events,[11] (2) emotional objects,[12] and (3) emotional interests.[13]

First, when emotional events, such as death, disability, or divorce trigger a contract's formation or performance and provide emotional reasons for desiring the contract, a promisor could anticipate that emotional distress would arise from breach. These events usually concern the physical and mental health of individuals and their families. The most typical, and widely accepted, examples involve contracts for funerals and burial of close relatives. But similarly, life and disability insurance contracts also fall into this category, as do contracts for nursing home care when a person is unable to care for herself. This category would also extend to contracts relating to the breakdown of marriage.

Second, when a contract involves objects of sentimental or aesthetic value, a promisor could anticipate that emotional distress would flow from a breach. For instance, if pets transported by airplane die from mishandling,[14] or if a family heirloom is lost when repaired, the promisor can foresee emotional distress.[15] In most cases, these objects' sentimental value is specifically communicated to the promisor at the time of the contract's formation. However, in certain cases, such as home construction and decorating, this information might be imputed to the promisor.

Third, an emotional interest exists when an element of the contract is the creation of happiness or security. For instance, a vacation[16] or wedding[17] presents the expectation of happiness, and if ruined, the resulting emotional distress is foreseeable. An interest in security arises when

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[11] *See infra* text accompanying notes 41-72.

[12] *See infra* text accompanying notes 73-103.

[13] *See infra* text accompanying notes 104-68.

[14] Newell v. Canadian Pac. Airlines, 74 D.L.R.3d 574 (Ont. County Ct. 1976).

[15] Windeler v. Scheers Jewelers, 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (1970).

[16] *See infra* text accompanying notes 119-29.

[17] *See infra* text accompanying notes 116-18.

the contract specifically provides for peace of mind or when a contract extends over many years. The emotional interest in security is present in insurance contracts during the entire time payments are made but the calamity insured against does not materialize. Similarly, a long-term employee expects job security.

In commercial cases, when the particular contract is for profit, the emotional aspect test will preclude emotional distress damages. When profit is the motive, aggravation and stress are part of the cost necessary to attain business success. However, this does not preclude emotional distress damages in all commercial situations. A particular contract between businesspeople may not have a profit motive and may involve an emotional interest, thus permitting emotional distress damages.

This new test provides guidance in assessing when emotional distress damages are appropriate for contract breaches. Part I examines the development of the present rule and its defects. Part II defines and discusses the emotional event and object parts of the emotional aspect test. Part III explains the test's emotional interest component and its application in commercial situations.

I. PERSONAL/COMMERCIAL DISTINCTION

The venerable *Hadley v. Baxendale*[18] case provides the traditional rule for emotional distress damages: "the damages that can be recovered for a breach are only such as may reasonably be supposed to have been within the contemplation of the parties at the time of the making of the contract, as the probable result of a breach. Other damages are too remote."[19] Emotional distress damages originally were considered too remote.[20] Following *Hadley*, a California court doubted that any "sane person could be expected to assume such uncertain and limitless liabil-

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[18] 9 Ex. 341, 156 Eng. Rep. 145 (1845).

[19] Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51, 56, 87 P. 1093, 1095 (1906). The original version of the California Civil Code, enacted in 1872, included the language "which the party in fault had notice [of], at the time of entering into the contract, or at any time before the breach, and while it was in his power to perform the contract upon his part, would be likely to result from such a breach." CAL. CIV. CODE § 3300 (1872). This formulation followed the New York Field Code exactly. Field Draft, N.Y. CIV. CODE § 1840 (Weed, Parsons & Co. 1865). Although the legislature deleted this language in 1874, CAL. CIV. CODE § 3300 (Deering 1984), it is still considered part of California law as expressed by the supreme court in *Hunt*. McCormick, *The Contemplation Rules as a Limitation upon Damages for Breach of Contract*, 19 MINN. L. REV. 497, 503 n.20 (1935).

[20] Westwater v. Grace Church, 140 Cal. 339, 342, 73 P. 1055, 1056 (1903).

ity" of any other rule.[21]

Despite concerns for certainty and limiting liability, the 1924 *Westervelt v. McCullough*[22] case extended the *Hadley* rule to contracts "relat[ing] to matters which concern directly the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which is such as directly to affect or move the affection, self-esteem, or tender feelings of that party . . . ."[23] The *Westervelt* contract provided for an elderly couple's lodging for as long as they lived. The defendant ousted the couple six months later. The court allowed recovery for the physical suffering resulting from the distress caused by the defendant's breach.[24] This established the rule allowing compensation for emotional distress in a "personal contract."

Therefore, the availability of emotional distress damages turns on whether a contract is personal. This is difficult to ascertain in situations in which the contract involves payment of money as well as personal concerns, such as insurance. For instance, the California Supreme Court concluded that peace of mind and security are personal concerns that are "[a]mong the considerations in purchasing liability insurance."[25] The court emphasized that the contract's purpose was protecting against risks, including mental distress, rather than obtaining a commercial advantage.[26]

When dual purposes exist, courts must decide which purpose predominates. If a court favors the consumer, the court may conclude that personal concerns dominate and emotional distress damages flow from the breach. If a court favors the insurer, the court may consider personal concerns only peripheral and preclude emotional distress damages.

In California and Michigan, the supreme courts reached opposite conclusions about the nature of disability insurance contracts. In *Egan v. Mutual of Omaha Insurance Co.*,[27] the California court decided that

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[21] *Hunt*, 150 Cal. at 56, 87 P. at 1095. The court also concluded that the consequences would "practically preclude the making of contracts altogether." *Id.*

[22] 68 Cal. App. 198, 228 P. 734 (1924).

[23] *Id.* at 208-09, 228 P. at 738.

[24] *Id.* at 209, 228 P. at 738.

[25] Crisci v. Security Ins. Co., 66 Cal. 2d 425, 434, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967).

[26] *Id.* The court allowed emotional distress damages in that case on the additional ground that there was a tort involved. *Id.* This tort was the breach of the "duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." *Id.* at 430, 426 P.2d at 177, 58 Cal. Rptr. at 17.

[27] 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979). Plaintiff Egan pur-

disability insurance's purpose is not a commercial advantage, even though the major motivation for purchasing such insurance is to provide funds in case the insured can no longer work. The purchase of insurance itself brings peace of mind and security.[28] However, in *Kewin v. Massachusetts Mutual Life Insurance Co.*,[29] the Michigan Supreme Court decided that disability contracts were commercial in nature because they are agreements to pay a sum of money upon the occurrence of a specified event.[30] The court defined a commercial con-

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chased a health and disability policy that provided lifetime income of $200 per month if he became totally disabled as a result of injury other than sickness and other causes or sickness sufficiently severe to cause confinement to his home. For nonconfining illnesses, the policy provided for a maximum of three months payment. Prior to the claim at issue, the insurance company had paid Egan for three claims for back-related injuries. For the fourth claim, the insurance company again attempted to settle by paying for three months. The company did not consult with Egan's physicians or provide examinations by their own physicians. The trial court directed a verdict against the insurance company for breaching the covenant of good faith and fair dealing by improperly investigating their insured's claim. In addition to general damages, the jury awarded $78,000 for emotional distress and $5 million in punitive damages. The supreme court upheld compensatory damages, which included the damages for emotional distress, but it considered the punitive damages excessive as a matter of law. *Id.* at 824, 598 P.2d at 460, 157 Cal. Rptr. at 490.

[28] *Id.* at 819, 598 P.2d at 456, 157 Cal. Rptr. at 486.

[29] 409 Mich. 401, 295 N.W.2d 50 (1980). Plaintiff Kewin purchased a disability income protection policy that provided $500 a month after a 30-day waiting period if he became substantially disabled. Within two months of buying the policy, Kewin severely injured his right knee in a motorcycle accident. After filing a claim, the insurance company informed him that it required monthly claims and reports from a physician to substantiate the disability. After three months of late payments and overt and covert investigations of the plaintiff, the insurance company persuaded the plaintiff to waive his rights for six months in return for $1500. After six months, Kewin requested and received additional claim forms but never returned them. A jury awarded Kewin $75,000 for emotional distress and $50,000 for exemplary damages. The intermediate appeals court reversed the emotional distress award as duplicative of the exemplary damage award. However, the court held that insurance contracts involved matters of mental concern. Kewin v. Massachusetts Mut. Life Ins. Co., 79 Mich. App. 639, 649, 263 N.W.2d 258, 263 (1977).

[30] *Kewin*, 401 Mich. at 416, 295 N.W.2d at 53-54; *see also* Manley v. Detroit Auto. Inter-Ins. Exch., 425 Mich. 140, 388 N.W.2d 216 (1986) (no fault — refusal to pay); Young v. Michigan Mut. Ins. Co., 139 Mich. App. 600, 362 N.W.2d 844 (1984) (no fault — refusal to pay); Butt v. Detroit Auto. Inter-Ins. Exch., 129 Mich. App. 211, 341 N.W.2d 474 (1983) (no fault — refusal to pay maximum amount for maximum period); Butler v. Detroit Auto. Inter-Ins. Exch., 121 Mich. App. 727, 329 N.W.2d 781 (1982) (no fault — refusal to pay); Schaible v. Michigan Mut. Ins. Co., 116 Mich. App. 116, 321 N.W.2d 860 (1982) (no fault — refusal to pay); Van Marter v. American Fidelity Fire Ins. Co., 114 Mich. App. 171, 318 N.W.2d 679 (1982) (no fault — delay in payments); Liddell v. Detroit Auto. Inter-Ins. Exch., 102 Mich. App. 636, 302

tract as one dealing with "trade and commerce . . . profit . . . [and] pecuniary aggrandizement,"[31] in which "pecuniary interests are most important."[32]

This definition actually has three parts: (1) trade and commerce, (2) profit or pecuniary aggrandizement, and (3) payment of money. Trade and commerce and payment of money are the broadest parts of the definition. Under these criteria, almost every contract is commercial. Whenever a consumer contracts for a service from a company engaged in selling it, the contract arguably is commercial. If payment of funds is used as the criterion, insurance must always have a commercial character.[33] However, this view focuses only on the contract's subject matter, not its purpose.

On the other hand, the profit or pecuniary aggrandizement standard does focus on the contract's purpose. From the insurers' viewpoint, an insurance contract is commercial because the purpose in selling policies

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N.W.2d 260 (1981) (no fault — delay in payments); Jerome v. Michigan Mut. Auto. Ins. Co., 100 Mich. App. 685, 300 N.W.2d 371 (1980) (no fault — delay in payments). For criticism of *Kewin*, see Note, *Insurance Law*, 60 U. DET. J. URB. L. 120 (1982); Note, *Contracts-Breach of Disability Insurance Contract-Nonrecoverability of Mental Anguish Damages in "Commercial" Contracts*, 27 WAYNE L. REV. 1357 (1981). Professional liability insurance was considered commercial in Stein, Hinkle, Dawe & Assoc., Inc. v. Continental Casualty Co., 110 Mich. App. 410, 424, 313 N.W.2d 299, 305 (1981) (refusal to defend architectural and engineering firm). The only suggestion of an exception to the strict Michigan rule came in the cases of Commercial Union Ins. Co. v. Medical Protective Co., 136 Mich. App. 412, 418-19, 356 N.W.2d 648, 651-52 (1984) (allowing excess insurer's bad faith claim against primary insurer); and Commercial Union Ins. Co. v. Liberty Mut. Ins. Co., 137 Mich. App. 381, 391-92, 357 N.W.2d 861, 866 (1984) (defining excess insurer's bad faith as "more than negligence" and "less than fraud"). Both courts held that an insurance company may be liable for refusing to settle a claim in a third party situation when the insured is exposed to excess liability. Young v. Michigan Mut. Ins. Co., 139 Mich. App. 600, 607 n.1, 362 N.W.2d 844, 847 n.1 (1984) (distinguishing first party claim and applying *Kewin*). The Michigan Supreme Court recently decided that employment contracts are commercial because their primary purpose is economic rather than psychic satisfaction or personal security. Valentine v. General Am. Credit, Inc., 420 Mich. 256, 263, 362 N.W.2d 628, 631 (1984).

[31] *Kewin*, 409 Mich. at 416, 295 N.W.2d at 53 (quoting Stewart v. Rudner, 349 Mich. 459, 471, 84 N.W.2d 816, 824 (1957)).

[32] *Id.* at 416, 295 N.W.2d at 53.

[33] Similarly, an employment contract in which a salary is paid for work done would be commercial under the *Kewin* payment of funds analysis. *See* Valentine v. General Am. Credit, Inc., 420 Mich. 256, 263, 362 N.W.2d 628, 631 (1984); Cowdry v. A.T. Trans., 141 Mich. App. 617, 367 N.W.2d 433 (1985). A contract with a bank would also be considered commercial since the bank pays funds from customers' accounts. *See infra* text accompanying notes 162-66.

is profit. However, from the purchaser's viewpoint, an insurance contract is not commercial because the purpose is protection against a monetary risk, not a profit. The Michigan court adopted the insurers' viewpoint, but the better rule defines a commercial contract as one in which both parties have a profit motive.

However, even the Michigan court's broad commercial contract definition has an exception. This exception concerns personal contracts involving matters of mental concern and solicitude, with particular emphasis on "life and death."[34] The case establishing the Michigan definition, *Stewart v. Rudner*,[35] involved a woman who endured two stillbirths and became pregnant a third time. She and her 63-year-old husband were convinced that their only chance for a live child was through a Caesarean section, which their doctor agreed to perform. At delivery, the Caesarean was not performed and another stillborn birth resulted. The jury awarded the plaintiff $5000 on the contract claim. On appeal, the supreme court concluded that the "essence . . . the indispensable ingredient" of the contract was the "only chance for life," and that "[t]here was not an iota of the commercial in the contract."[36]

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[34] The court listed the following kinds of contracts as personal: breach of marriage promise, breach of contracts by carriers and hotels, and breach of burial contracts. Stewart v. Rudner, 349 Mich. 459, 469-70, 84 N.W.2d 816, 824 (1957); *see also Valentine*, 410 Mich. at 262, 362 N.W.2d at 631.

[35] *Stewart*, 349 Mich. at 469, 84 N.W.2d at 824.

[36] *Id.* at 472, 84 N.W.2d at 825; *see also* Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (1978) (finding contract to perform a tubal ligation personal). Most plaintiffs use tort actions when suing physicians. However, under California law, plaintiffs can allege breach of contract if a physician promises a particular result as opposed to a general statement concerning good results, and the patient relies on that promise. *E.g.*, Herrera v. Superior Court, 158 Cal. App. 3d 255, 261, 204 Cal. Rptr. 553, 557 (1984) (misdiagnosis resulting in improper surgery to foot); McKinney v. Nash, 120 Cal. App. 3d 428, 442, 174 Cal. Rptr. 642, 648-49 (1981) (neurological damage from spinal anesthetic); Christ v. Lipsitz, 99 Cal. App. 3d 894, 899, 160 Cal. Rptr. 498, 501-02 (1979) (unsuccessful vasectomy); Pulvers v. Kaiser Found. Health Plan, Inc., 99 Cal. App. 3d 560, 160 Cal. Rptr. 392 (1979) (delay in biopsy); Depenbrok v. Kaiser Found. Health Plan., Inc., 79 Cal. App. 3d 167, 144 Cal. Rptr. 724 (1978) (unsuccessful tubal ligation). Similarly, in New York, a breach of contract claim is sufficient only if "based upon an express special promise to effect a cure or to accomplish some definite result." Mitchell v. Spataro, 89 A.D.2d 599, 599, 452 N.Y.S.2d 646, 647 (1982); *see also* Delaney v. Krafte, 98 A.D.2d 128, 130, 470 N.Y.S.2d 936, 938 (1984) (unsuccessful abortion claim did not state a contract cause of action); Karlsons v. Guerinot, 57 A.D.2d 73, 83, 394 N.Y.S.2d 933, 939-40 (1977) (leave to amend contract claim for birth of deformed child); Paciocco v. Acker, 121 Misc. 2d 342, 343, 467 N.Y.S.2d 548, 549 (Sup. Ct. 1983) (leave to amend contract claim for scarring of face in plastic surgery). However, emotional distress damages are recoverable in such a claim only if related to economic loss. *Id.* at 344, 467 N.Y.S.2d at 549-50 (citing Robins v. Finestone, 308 N.Y.

A narrow definition of a personal contract has the same rationale as the basic *Hadley* rule: providing limits to liability so that businesspeople can plan their economic affairs. Through the certainty that a rule limiting liability provides, businesspeople can maximize their ability to earn profits. However, this goal of certainty is often unattainable today because even if the contract rules are narrowly drawn, a plaintiff may recover damages through a tort remedy. Even the Michigan Supreme Court recognized the possibility that denying emotional distress damages leaves the plaintiff "with less than a full recovery."[37] In the insurance context, the court has most recently hinted at the possibility of recovery for "an insurer's intentional infliction of emotional distress."[38]

On the other hand, the broader definition of personal contracts recognizes that emotional distress is legitimately compensable when a contract is breached. This results from an increased understanding of emotional distress in the field of mental health,[39] and increased recognition in tort law that emotional well-being demands legal protection.[40] Also,

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543, 547, 127 N.E.2d 330, 332 (1955)). The rationale is that the contract action should not merely be a substitute for a tort action. *Mitchell*, 89 A.D.2d at 599, 452 N.Y.S.2d at 647; *accord* Silberstein v. County of Westchester, 92 A.D.2d 867, 867, 459 N.Y.S.2d 838, 839 (1983); *see also* Austin v. University of Cal., 89 Cal. App. 3d 354, 358, 152 Cal. Rptr. 420, 422 (1979). *See generally* Annotation, *Measure and Elements of Damages in Action Against Physician for Breach of Contract to Achieve Particular Result or Cure*, 99 A.L.R.3d 303 (1980).

[37] Valentine v. General Am. Credit, Inc., 420 Mich. 256, 261, 362 N.W.2d 628, 630 (1984).

[38] Roberts v. Auto-Owners Ins. Co., 422 Mich. 594, 605, 374 N.W.2d 905, 909 (1985). This decision still reflects the view most protective of insurers' interests. The court reiterated its rejection of the tort of bad faith breach of an insurance contract, and indicated that it will limit those situations in which it will permit an intentional infliction theory. *Id.* at 604-05, 374 N.W.2d at 909-10.

[39] Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 924-25, 616 P.2d 813, 817, 167 Cal. Rptr. 831, 835 (1980).

[40] Particularly the torts of intentional and negligent infliction of emotional distress. *See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968) (negligent infliction); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 337-38, 240 P.2d 282, 286 (1952) (intentional infliction); *see also* Annotation, *Burial Services: Liability of Cemetery in Connection with Conducting or Supervising Burial Services*, 42 A.L.R.4th 1059 (1985) [hereafter Annotation, *Burial Services*]; Annotation, *Modern Status of Intentional Infliction of Mental Distress as Independent Tort: "Outrage,"* 38 A.L.R.4th 998 (1985); Annotation, *Recovery for Emotional Distress Resulting from Statement of Medical Practitioner or Official, Allegedly Constituting Outrageous Conduct*, 34 A.L.R.4th 688 (1984); Annotation, *Recovery of Damages for Mental Anguish, Distress, Suffering or the Like, in Action for Wrongful Attachment, Garnishment, Sequestration, or Execution*, 83 A.L.R.3d 598 (1978); An-

interest in consumer protection should encourage courts to take consumer concerns, even beyond economic concerns, into account.[41]

However, the personal/commercial distinction does not provide a bright line for compensating emotional distress. The danger from the business viewpoint is that courts may assess emotional distress damages whenever a breach occurs. *Hadley*'s rationale is clearly relevant here: courts should not assess damages unless such damages are foreseeable at the time of contracting. Therefore, the parties must have some indication at the time of contracting that emotional distress would result in the event of a breach. The personal/commercial distinction is inadequate because courts can easily manipulate the distinction to favor either the businessperson or the consumer. The emotional aspect test, proposed in the next section, provides guidelines assuring certainty for the businessperson, yet also assuring compensation for legitimate claims for emotional distress.

II. The Emotional Aspect Test

If the promisor can anticipate at the time of contracting that emotional events, objects, or interests are associated with the contract, she should also expect that emotional distress damages will flow from a breach. Therefore, the definitions of emotional events, objects, and interests are important.

A. Emotional Events

First, an emotional event exists when a contract is performed at a time when the promisee is experiencing emotions such as grief, sadness, or stress. Emotional events usually relate to the physical or mental health of the promisee or a close family member. Second, an emotional

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notation, *Recovery for Mental or Emotional Distress from Injury to, or Death of, Member of Plaintiff's Family Arising from Physician's or Hospital's Wrongful Conduct*, 77 A.L.R.3d 447 (1977); Annotation, *Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury*, 29 A.L.R.3d 1337 (1970). *See generally* Restatement (Second) of Torts § 46 (1965). The law finally caught up with medical science in at least one context by relaxing the physical illness requirement. *Molien*, 27 Cal. 3d at 928-31, 616 P.2d at 819-21, 167 Cal. Rptr. at 837-39.

[41] *See* Bolla, *supra* note 4; Diamond, *The Tort of Bad Faith Breach: When, If at All, Should It Be Extended Beyond Insurance Transactions?*, 64 Marq. L. Rev. 425 (1981); Kastely, *Compensation for Lost Aesthetic and Emotional Enjoyment: A Reconsideration of Contract Damages for Nonpecuniary Loss*, 8 U. Haw. L. Rev. 1 (1986); Comment, *Refining the Traditional Theories of Recovery for Consumer Mental Anguish*, 1979 B.Y.U. L. Rev. 81.

event may trigger the contract's formation, and the promisee in such a case has an emotional reason for desiring the contract. Ordinarily, knowledge of these events is imputed to the promisor because of the nature of the contract. In some cases, the promisee specifically informs the promisor of the emotional event.

Life and disability insurance contracts are performed at times when the beneficiary is experiencing emotions such as grief, sadness, or stress. In a life insurance contract, the loss of a spouse or close family member usually causes an emotional reaction. Similarly, in a disability insurance contract, the beneficiary has lost her physical ability to provide for herself. Breach at that time adds distress to an already emotional situation. In insurance, the expectation of security or peace of mind heightens the promisee's distress when a breach occurs.[42] Insurance provides security against the financial burdens of a loss of a spouse or one's health, thus blunting part of the calamity's emotional impact. Thus, life and disability insurance contracts clearly have an emotional aspect, and the insurer can anticipate emotional distress damages upon breach.

1. Death and Disability

The death of a close relative is an emotional event that triggers the formation of contracts for burial or funeral arrangements. Contracts of this type are universally recognized as having an emotional aspect. The California case of *Ross v. Forest Lawn Memorial Park*[43] illustrates the emotional event test. The plaintiff arranged for private funeral and burial services for her daughter, a seventeen-year-old punk rocker. Only family and invited guests were to attend; the daughter's punk rocker friends were excluded. However, punk rockers attended both the funeral and the burial services, disturbed the family by their attire and actions, and required calling the police to restore order. Fearing that the punk rockers would return, the plaintiff arranged to have the cemetery personnel guard her daughter's grave. The next day the plaintiff found that the grave and flowers had been disturbed. The court of appeal held that emotional distress was foreseeable because "those very events were within the contemplation of the parties at the time the contract was made."[44]

Emotional events were present in *Ross* because of the contract's nature and because of specific information related to the promisor. At the

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[42] *See infra* text accompanying notes 130-44.

[43] 153 Cal. App. 3d 988, 203 Cal. Rptr. 468 (1984).

[44] *Id.* at 996, 203 Cal. Rptr. at 473.

time of the contract's performance, the promisee was experiencing emotions such as grief or shock at the loss of her child. In addition, the plaintiff indicated that the exclusion of punk rockers was to prevent disturbance during that emotional time. Courts show much sensitivity to the emotions of grieving relatives, and invariably allow emotional distress damages for breaches of funeral contracts.[45]

Relatives' emotions may not receive equal consideration when a nursing home patient receives poor care. Contracts providing long-term health care and a home for elderly people who cannot care for themselves unquestionably have an emotional aspect. The emotional event is the inability to care for oneself and the emotional reason for desiring the contract is the security of physical and health care. Indeed, an early California case, *Westervelt v. McCullough*,[46] allowed emotional distress damages when a promisor evicted an elderly couple after promising lodging for the rest of their lives. Similarly, the New Hampshire Supreme Court, which follows a very strict approach toward emotional distress damages,[47] allowed the possibility that eviction from a nursing home is an exception to the rule that "damages for mental suffering 'are not generally recoverable in a contract action.' "[48]

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[45] Burial contracts were considered "personal" in California as early as 1948. *See* Chelini v. Nieri, 32 Cal. 2d 480, 196 P.2d 481 (1948). In *Chelini*, a mortuary director promised the plaintiff that the plaintiff's mother would be preserved almost forever. The plaintiff discovered that his mother's body had actually become a " 'rotted, decomposed and insect and worm infested mess,' " and the court allowed compensatory damages of $10,000 for the physical suffering that resulted from the plaintiff's distress. However, *Chelini* was not broadly interpreted in California. *See, e.g.*, Allen v. Jones, 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980) (plaintiff loses on contract cause of action because no physical illness alleged); Cohen v. Groman Mortuary, Inc., 231 Cal. App. 2d 1, 41 Cal. Rptr. 481 (1964) (plaintiff loses because contract cause of action not pleaded); *see also* Renihan v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535 (1932); Meyer v. Nottyer, 241 N.W.2d 911 (Iowa 1976); Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949). *See generally* Annotation, *Burial Services*, *supra* note 40.

[46] 68 Cal. App. 198, 228 P. 734 (1924).

[47] The court denied emotional distress damages in Lash v. Cheshire County Sav. Bank, Inc., 124 N.H. 435, 439-40, 474 A.2d 980, 982 (1984) (bank loan); Jarvis v. Prudential Ins. Co., 122 N.H. 648, 654, 448 A.2d 407, 410 (1982) (health insurance); Young v. Abalene Pest Control Servs., Inc., 122 N.H. 287, 290, 444 A.2d 514, 516 (1982) (insect exterminator in home); Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 615, 392 A.2d 576, 581-82 (1978) (fire insurance on business); Monge v. Beebe Rubber Co., 114 N.H. 130, 134, 316 A.2d 549, 552 (1974) (employment contract).

[48] Guerin v. New Hampshire Catholic Charities, Inc., 120 N.H. 501, 506, 418 A.2d 224, 227 (1980). The complaint alleged both breach of contract and negligence in the

However, courts are reluctant to award emotional distress damages in cases involving improper care rather than a total lack of care. In a recent California case, *Wiggins v. Royale Convalescent Hospital*,[49] the plaintiff wife sued for emotional distress damages after her terminally ill husband fell from his hospital bed and was seriously injured. Although the original complaint did not include a contract cause of action, on appeal the plaintiff argued that the court should allow her to add that theory.[50] The court rejected her argument, refusing to "plunge into an uncharted and limitless sea of liability."[51] However, Justice Sonenshine's dissent emphasized that the plaintiff had sought peace of mind in contracting for her husband's care, "namely the knowledge that her

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eviction of a couple who later died. The estate of the deceased brought the complaint after the statute of limitations for the tort claim had run. The court found the cause of action for breach of contract viable, and held that the prayer for emotional distress damages "does not require the action to be deemed one in tort." *Id.* at 506, 418 A.2d at 228; *cf.* Metropolitan Life Ins. Co. v. McCarson, 429 So. 2d 1287 (Fla. 1983) (emotional distress damages allowed when insurance company failed to pay for home nursing care).

[49] 158 Cal. App. 3d 914, 206 Cal. Rptr. 2 (1984).

[50] She argued that the case fell within the scope of the funeral case of Allen v. Jones, 104 Cal. App. 3d 207, 163 Cal. Rptr. 445 (1980). In *Allen*, the plaintiff made an oral agreement with a mortician to cremate the plaintiff's brother's body and ship the ashes to Illinois. Unfortunately, the ashes were lost in transit. The plaintiff claimed emotional distress. Alternatively, she argued that the court should apply Wynn v. Monterey Club, 111 Cal. App. 3d 789, 168 Cal. Rptr. 878 (1980) (*see infra* notes 59-61 (discussing *Wynn*)). The court of appeal rejected this argument by interpreting *Allen* narrowly as a mere negligence case. *Wiggins*, 158 Cal. App. 3d at 918, 206 Cal. Rptr. at 4-5. However, dicta in *Allen* indicate that the plaintiff stated a cause of action for emotional distress damages, arising from breach of contract, except for physical injury associated with the distress. *Allen*, 104 Cal. App. 3d at 212-13, 163 Cal. Rptr. at 449. Judge Gardner, in a stinging concurrence, severely criticized the physical injury requirement: "I would like to see the Supreme Court take a sharp knife and cut this whole cockamamie distinction out of the law." *Id.* at 217, 163 Cal. Rptr. at 452. The California Supreme Court granted his wish in Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 928-31, 616 P.2d 813, 819-21, 167 Cal. Rptr. 831, 837-38 (1980). The physical injury rule was arguably abolished in contract cases as well in *Wynn*, 111 Cal. App. 3d at 800-01, 168 Cal. Rptr. at 883. Without the physical injury requirement, the *Allen* court probably would have allowed the plaintiff to plead emotional distress damages under a contract theory. The *Wiggins* court also questioned the scope and reasoning of *Wynn*. The *Wiggins* court limited *Wynn* to the issue of setting aside a summary judgment on the basis of the legality of the contract and labelled the rest of the opinion dicta. *Wiggins*, 158 Cal. App. 3d at 919, 206 Cal. Rptr. at 5. The *Wiggins* court also questioned *Wynn*'s reliance on Leavy v. Cooney, 214 Cal. App. 2d 496, 29 Cal. Rptr. 580 (1963), which involved both contract and tort claims. *Wiggins*, 158 Cal. App. 3d at 919-20, 206 Cal. Rptr. at 5-6.

[51] *Wiggins*, 158 Cal. App. 3d at 920, 206 Cal. Rptr. at 6.

terminally ill loved one would receive quality care."[52]

In a similar case, *Free v. Franklin Guest Home, Inc.*,[53] a nursing home resident who suffered from Alzheimer's disease was severely burned while bathed by an orderly. The victim's wife, on her husband's behalf, sued on a contract theory. The court noted that the contract was "one in which personal comfort was a principal object if not the exclusive object."[54] Therefore, even under traditional doctrine, nursing home contracts could fall into the personal contract category.

Under the emotional event test, courts would allow emotional distress damages in these cases. The emotional event that triggers the contract's formation is severe illness, which means that the individual and her family can no longer care for the ill person by themselves. Also, the contracting family has a particular emotional reason for the contract — peace of mind that the ill person will have care. Therefore, the promisor can expect that emotional distress would flow from a breach. If emotional distress damages are available for the family in such cases, may the cared-for individual also claim emotional distress damages? In *Wiggins*, the wife was claiming damages for her own emotional distress rather than her husband's. Although some problems existed with her recovery under a tort theory,[55] no problem existed in contract law since she actually contracted for her husband's care. As long as the contract had an emotional aspect for her, she could recover emotional distress damages. Her husband could recover either as a party or as a third-party beneficiary to the contract. He could meet the emotional event test more easily since he directly experienced losing his ability to care for himself and his needs.

Nursing home operators would argue that only the party contracting for the care and the party actually receiving the care should recover. However, an elderly person commonly has limited financial means. If, for example, a widow falls ill, her children usually become involved. Typically, one child signs the contract and pays for the mother's care. If the contract is breached, the mother and the child who signed the contract could recover. Yet another child, not a party to the contract,

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[52] *Id.* at 927, 206 Cal. Rptr. at 10 (Sonenshine, J., dissenting).

[53] 463 So. 2d 865 (La. Ct. App. 1985).

[54] *Id.* at 874. The court referred to the contract itself, which promised to treat the patient with " 'consideration, respect and full recognition of his dignity and individuality . . . .' " *Id.*

[55] *Wiggins*, 158 Cal. App. 3d at 918, 206 Cal. Rptr. at 3-4. The court did not consider her a "direct victim" of the tortious conduct, as required by Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 928-31, 616 P.2d 813, 816, 167 Cal. Rptr. 831, 834 (1980).

may suffer the brunt of the emotional distress. A devoted daughter, son, brother or sister who did not sign the contract is precluded from recovery for emotional distress.

Nursing homes would argue that extending emotional distress damages beyond contracting parties would lead to the specter of limitless liability to family members for every minor breach committed. Liability to family members is certainly possible, but presently only under a tort theory.[56] A more reasonable approach is recognizing at least a spouse's emotional involvement in such a contract, even if he or she is not actually a contracting party.[57] Beyond the spouse, emotional distress damages should be available to those family members primarily responsible for the ill person's care prior to her admission to the nursing home.

Another question is whether courts should take into account the emotional distress susceptibility of particular groups of people, such as the elderly. Often the elderly are very concerned with their health and the financial insecurity poor health brings. However, saying that the elderly are more susceptible to emotional distress is patronizing. Many of them have survived to their age because of their emotional toughness. It is not the elderly's emotional character that makes emotional distress likely when a nursing home contract is breached, but the concerns that they share with people of any age who become so ill they cannot care for themselves.

In conclusion, emotional distress damages are foreseeable when nursing home contracts are breached. The emotional events leading to the

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[56] The theory is negligent infliction of emotional distress and would extend to the immediate family. The test is whether "plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship." Dillon v. Legg, 68 Cal. 2d 728, 741, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968). *Compare* Mobaldi v. Regents of Univ. of Cal., 55 Cal. App. 3d 573, 582-83, 127 Cal. Rptr. 720, 726 (1976) (foster mother included) *with* Trapp v. Schuyler Constr., 149 Cal. App. 3d 1140, 1143, 197 Cal. Rptr. 411, 412 (1983) (first cousin excluded) *and* Kately v. Wilkinson, 148 Cal. App. 3d 576, 584-85, 195 Cal. Rptr. 902, 907 (1983) (friend excluded). On the question of whether unmarried cohabitants are "closely related," compare Elden v. Sheldon, 164 Cal. App. 3d 788, 210 Cal. Rptr. 755 (1985) (no family relationship), *hg. granted*, Apr. 25, 1985 and Drew v. Drake, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980) (no family relationship), with Garcia v. Superior Court, 169 Cal. App. 3d 367, 215 Cal. Rptr. 189 (1985) (stable and significant nonmarital relationship), *rev. granted*, Sept. 19, 1985, *dismissed and remanded*, May 1, 1986 and Ledger v. Tippitt, 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985) (stable and significant nonmarital relationship).

[57] In most cases, a spouse would be a party to the contract even if not actually paying the bills. However, only 10 percent of nursing home residents have a living spouse. Note, *The Ties That Bind: Life Care Contracts and Nursing Homes*, 8 AM. J. L. & MED. 153, 154 (1982).

contract's formation and the emotional need for that contract put the health care provider on notice that emotional distress may flow from breach. Courts may, however, limit potential liability to the person cared for, the contracting family member, and the family member rendering care prior to the nursing home admission.

2. Divorce

Another emotional event is the breakdown of a marriage.[58] Both spouses experience strong emotions during a divorce. Courts should include contracts entered into before, during, or after divorce under the emotional aspect test. The following cases illustrate when emotional distress damages should be available.

In *Wynn v. Monterey Club*,[59] the plaintiff's wife was a compulsive gambler, putting a severe strain on their marriage. The husband contracted with the Monterey Club, a gambling establishment, to deny his wife access and deny her any check cashing privileges. In exchange, the husband promised to satisfy his wife's gambling debts. However, the wife continued gambling and incurred losses of about $30,000. The husband then filed for dissolution. He also sued the gambling club for breach of contract, which caused the disruption of his marriage and resulted in emotional distress. He appealed summary judgment in the club's favor. The court of appeal held that the "nature [of the contract] put the defendants on notice that a breach thereof would result in emotional and mental suffering by the plaintiff."[60] The motivation behind

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[58] Events involving marriage and divorce rank very high on the Social Readjustment Rating Scale used by some psychologists to categorize major life events according to stress involved. Of the 43 major life events listed, five of the top ten include: death of spouse, divorce, marital separation, marriage, marital reconciliation. Note, *The Expectation of Peace of Mind: A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts*, 56 S. CAL. L. REV. 1345, 1364-65 (1983) [hereafter Note, *Basis for Recovery*].

[59] 111 Cal. App. 3d 789, 168 Cal. Rptr. 878 (1980).

[60] *Id.* at 801, 168 Cal. Rptr. at 884. The court noted that no cause of action for alienation of affection exists in California under CAL. CIV. CODE § 43.5, but cited authority for the proposition that a cause of action can be stated when a marriage breaks down because of a tort. *Id.* at 800-01, 168 Cal. Rptr. at 883 (citing Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 931, 616 P.2d 813, 821-22, 167 Cal. Rptr. 831, 839-40 (1980)); *cf.* Martino v. Family Serv. Agency, 112 Ill. App. 3d 593, 597-98, 445 N.E.2d 6, 9-10 (1982) (malpractice tort not applied to social work, but contract theory precludes emotional distress damages). *See generally Work of 1939 Legislature, the "Anti-heart Balm" Statute*, 13 S. CAL. L. REV. 1, 37 (1939); Note, *Alienation of Affections: "Anti-heart Balm" Statute*, 13 S. CAL. L. REV. 523 (1940); Note, *Breach of Promise of Marriage: California Civil Code Section 43.5: Does Not Apply to Action*

the contract was the marriage's tranquillity and the husband's emotional well-being.[61] Therefore, the appellate court reversed. The emotional event triggering the contract's formation was the strain on the marriage caused by the wife's gambling. The husband's emotional reason for desiring the contract was to save a faltering marriage.

The promisor may know of these emotional events in two ways: (1) the promisee may relate specific information concerning the events and reasons for the contract, or (2) the events and reasons may be obvious from the type of contract. The promisor in *Wynn* knew or should have known about the events from the husband's explanation at the time the contract was formed. Alternatively, when a third party involves herself in a dispute between husband and wife, the nature of the contract should put the promisor on notice that emotional distress may result upon breach.

Agreements between spouses made at the time of divorce also meet the emotional event test. However, the North Carolina Supreme Court used a questionable approach in *Stanback v. Stanback*.[62] In that case, Mrs. Vanita Stanback claimed that her former husband, Fred, had breached their separation agreement. Fred had agreed to pay any increase in federal and state taxes if the Internal Revenue Service disallowed Vanita's claimed deduction of attorney's fees. After the IRS placed a lien on her home and a lender tried to foreclose, Vanita sued

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in Tort for Fraud, 4 UCLA L. REV. 114 (1956).

[61] *Wynn*, 111 Cal. App. 3d at 799, 168 Cal. Rptr. at 883.

[62] 297 N.C. 181, 194-95, 254 S.E.2d 611, 620-21 (1979). This is just one in a series of lawsuits that surrounded the divorce of Fred and Vanita Stanback. *See* Stanback v. Westchester Fire Ins. Co., 68 N.C. App. 107, 314 S.E.2d 775 (1984); Stanback v. Stanback, 53 N.C. App. 243, 280 S.E.2d 498 (1981); Stanback v. Stanback, 37 N.C. App. 324, 246 S.E.2d 74 (1978). First, Vanita Stanback filed an action in superior court alleging that Fred had breached part of their separation agreement. She claimed that he failed to fulfill his promise to reimburse her for any taxes she was required to pay because of his payment of her attorney's fees. The trial court dismissed the plaintiff's claims for $250,000 for mental anguish and consequential damages. The court of appeals affirmed in *Stanback*, 37 N.C. App. at 327-31, 246 S.E.2d at 77-79. The North Carolina Supreme Court affirmed the lower court's holding on consequential damages, but disallowed punitive damages in *Stanback*, 297 N.C. at 195-96, 199, 254 S.E.2d at 621, 623. On remand, the superior court held the husband did not breach the contract, making the damages question moot. The court of appeals affirmed in *Stanback*, 53 N.C. App. at 246-48, 280 S.E.2d at 500-01. Fred Stanback then sued his insurer, which had refused to defend his breach of contract action. The policy obligated the insurer to pay the insured's liability for personal injury or property damage and to defend any suit alleging such injury or damage. The superior court found that the insurer had a duty to defend. The court of appeals affirmed in Stanback v. Westchester Fire Ins. Co., 68 N.C. App. 107, 111-14, 314 S.E.2d 775, 777-79 (1984).

Fred. She requested approximately $16,000 in general damages, $250,000 for mental anguish, and $100,000 for punitive damages. The trial court dismissed both the mental anguish and punitive damages counts.

The North Carolina Supreme Court affirmed the dismissal of the mental anguish count, finding that the separation agreement was commercial.[63] According to the court, the North Carolina rule defining personal contracts is similar to Michigan's. The court specifically rejected the California approach as too broad,[64] then formulated a test for determining the difference between a personal and commercial contract. First, a commercial contract is concerned with "trade and commerce with concomitant elements of profit involved," and "pecuniary interests [must be] the dominant motivating factor in the decision to contract."[65] On the other hand, a personal contract "must be one in which the benefits contracted for relate *directly* to matters of dignity, mental concern or solicitude, or the sensibilities of the party to whom the duty is owed, and which *directly* involves interests and emotions recognized by all as involving great probability of resulting mental anguish if not respected."[66]

In applying the test to the facts, the court concluded that although the contract did not concern trade, commerce or elements of profit, its dominant motivating factor was pecuniary interest: the payment of money if Vanita's tax deduction was disallowed. The court then reasoned that the contract was commercial because of the lack of direct relation to matters of mental concern and because of the lack of direct involvement of interests recognized by all as resulting in mental anguish if breached.[67] The court could have settled this case under *Kewin*'s "payment of money" test. However, the court went to great lengths to define personal contracts very narrowly, using the "direct relation and involvement" and "recognized by all" language.

The North Carolina test is faulty for two reasons. First, the "dominant motivating factor" in the decision to contract is always difficult to determine. Saying that a contract involving payment of money automatically has a financial goal as its dominant purpose is highly artificial.

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[63] *Stanback*, 297 N.C. at 186-96, 254 S.E.2d at 616-21.

[64] *Id.* at 194, 254 S.E.2d at 620.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 195, 254 S.E.2d at 621. The only contracts the court deemed personal were burial contracts, contracts to perform funeral services, contracts to marry, and contracts to perform certain medical services. *Id.*

The most apt analogy is the insurance contract. In reality, the *Stanback* contract is most like an insurance contract because it provided for payment of money if a particular event occurred. The contract gave Mrs. Stanback security by preventing jeopardy of her financial situation if the tax deduction were disallowed. Although the payment of taxes is not the same as the death of a relative or loss of one's health, the lack of financial security is of high emotional concern.

Second, the "direct relation" and "recognized by all" requirements seem directed at excluding as many contracts as possible from emotional distress damages. This test's absurdity is illustrated by applying it to a funeral contract. After all, this type of contract does not relate *directly* to the promisee's mental concerns. It is actually for burying a deceased relative, not consoling the promisee at an emotional time.[68] The "direct relation" requirement soon becomes a futile argument over the directness of the relation between the contract and the promisee's mental concerns. The "recognition by all" requirement is similarly very difficult to meet since unanimity is particularly rare in the law.

Under the emotional event test, the more realistic conclusion is that the *Stanback* contract clearly had an emotional aspect. Arguably, *Stanback* had two emotional events. First, the divorce was the emotional event triggering the contract's formation. The emotional reason for the contract was peace of mind that the divorce's financial aspects were settled. Second, another emotional event triggered the contract's performance when the IRS disallowed the deduction and assessed additional taxes. Assessment of additional taxes may produce stress, particularly if financial security is threatened as it was in *Stanback*.[69] The emotional event test does not require the dominance of the emotional reason.

The *Stanback* case is distinguishable from *Wynn* on two counts. First, *Wynn* involved a contract with a third party, while the *Stanback* contract was between the spouses themselves. One could argue with some force that courts should exclude contracts between spouses from emotional distress damages. This is an easy line to draw, and would have the salutary result of taking the courts out of the business of as-

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[68] *Cf.* Hill v. Pinelawn Memorial Park, Inc., 50 N.C. App. 231, 236-37, 275 S.E.2d 838, 841-42 (contract for burial crypt is personal), *rev'd on other grounds*, 304 N.C. 159, 282 S.E.2d 779 (1981).

[69] The IRS subsequently filed a tax lien against Vanita's house and threatened a public auction sale. Forced to borrow to pay the additional taxes and unable to repay the loan, she faced foreclosure and loss of her house. *Stanback*, 297 N.C. at 186, 254 S.E.2d at 616.

sessing blame for the divorce's emotional pain.[70] The argument would continue that because both contracting parties are emotionally involved, emotional distress damages are too difficult to assess.

However, if the proposition is accepted that emotional distress damages are foreseeable in contracts with an emotional aspect known to the promisor, contracts between spouses present the strongest case for emotional distress damages. In a divorce, who better than a spouse knows what will cause distress to the other spouse? In some cases, emotional distress is both foreseeable as a result of breach and is actually the motivation for breaching. For this reason, the highly emotional circumstances of a divorce and its aftermath should not preclude emotional distress damages.

Second, *Wynn* differs from *Stanback* because the contract in *Wynn* involved an effort to save the marriage rather than an attempt to work out financial details after divorce. Here, the important question is when the emotional event, the breakdown of a marriage, begins and ends. The first issue is when, prior to the actual dissolution, the emotional event occurs. This is analogous to determining the time when spouses separate.[71] The emotional event called "breakdown" could begin at separation, even though the deterioration of marital relations probably begins earlier. If the promisor has specific knowledge of the particular circumstances, then the emotional event may begin before separation.

On the other hand, the performance of the contract may occur some time after the actual divorce, as in *Stanback*. The test also includes emotional events that trigger the contract's performance. This is primarily directed at contracts that the promisor knows are performed when a promisee is experiencing an emotional event, such as in funeral, disability, and life insurance contracts.

There are two potential approaches to the *Stanback* case. First, one could argue that the only emotional event is the divorce, but the performance was some time later. This would not preclude emotional distress damages, but may decrease damages because the emotional wound of divorce had time to heal. Alternatively, two emotional events could

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[70] After all, reluctance to assess blame in divorce cases is one of the reasons behind no-fault divorce. Hoffman, Inker & Volterra, *No-Fault Divorce in Massachusetts: An Explanation of Chapter 698*, 61 MASS. L.Q. 78 (1976); Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 UCLA L. REV. 1306, 1310-12 (1970).

[71] *E.g.*, CAL. CIV. CODE § 5118 (West 1983); *see In re* Makeig v. United Sec. Bank & Trust Co., 112 Cal. App. 138, 296 P. 673 (1931) (parting of ways with no present intention of resuming marital relations); Marriage of Baragry, 73 Cal. App. 3d 444, 140 Cal. Rptr. 779 (1977) (complete and final break in marriage).

exist: the divorce at the time of formation and the assessment of additional taxes triggering performance. Although the assessment of taxes does not have the same emotional impact as the divorce itself, the assessment required dealing with the ex-spouse, which could again open up the emotional wound. This was particularly likely when the contract was breached.

Therefore, contracts between spouses and third parties[72] that are formed or performed around the time of marital breakdown have an emotional aspect. If the promisor knows the emotional aspect at the time of contracting and the promisee has an emotional reason for desiring the contract, emotional distress damages are possible on breach.

B. Emotional Objects

Contracts involving emotional objects should also provide the basis for emotional distress damages.[73] If the promisee tells the promisor that the object involved has sentimental or aesthetic value, then the promisor can anticipate that emotional distress would result upon breach. The difficult areas concern contracts involving construction, decoration, and repair of homes. The Louisiana approach is examined extensively here to discern, in the absence of specific information given to the promisor, when emotional distress damages are available in contracts involving homes.

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[72] "Third parties" would include lawyers involved in family law matters. Although most often pursued on a tort theory, "legal malpractice constitutes both a tort and a breach of contract." Neel v. Magana, 6 Cal. 3d 176, 181, 491 P.2d 421, 423, 98 Cal. Rptr. 837, 839 (1971); *cf.* Quezada v. Hart, 67 Cal. App. 3d 754, 136 Cal. Rptr. 815 (1977) (quiet title to family home); McEvoy v. Helikson, 277 Or. 781, 562 P.2d 540 (1977) (custody). Usually a contract action is appropriate when an attorney fails to perform a particular task. *Compare* Heywood v. Wellers, [1976] 1 All E.R. 300, 306-07 (emotional distress damages recoverable when attorneys failed to secure injunction to restrain molestation by boyfriend) *with* Carroll v. Rountree, 34 N.C. App. 167, 173-75, 237 S.E.2d 566, 572 (1977) (emotional distress damage not recoverable when attorneys failed to obtain dismissal of alimony action and deed to marital property).

[73] Emotional distress damages are not usually available for a breach involving the sale of goods. U.C.C. § 2-105 (1976). However, an exception may be made on rare occasions under U.C.C. § 2-715 (1976). *See* Hirst v. Elgin Casket Co., 438 F. Supp. 906 (D. Mont. 1977) (sale of casket). ***But see*** Carpel v. Saget Studios, Inc., 326 F. Supp. 1330 (E.D. Pa. 1971) (wedding photographs). Compare this with "consumer" goods under U.C.C. § 9-109(1) (1981), defined as "used or bought for use primarily for personal, family, or household purposes." *See* Annotation, *Secured Transactions: What Constitutes "Consumer Goods" Under UCC § 9-109(1)*, 77 A.L.R.3d 1225 (1977).

Windeler v. Scheers Jewelers[74] is a typical example involving an emotional object. The plaintiff brought six rings to the defendant jeweler to make into a new ring for her daughter. At that time, she told the jeweler that the rings were cherished mementos, old family rings having great sentimental value. The rings were lost in shipment and never recovered. The trial court's award of $4000 was upheld on appeal because of the "special circumstance known to both of the parties at the time the contract was entered into."[75] "Special circumstances" are rarely conveyed at the time of contracting; the knowledge is more often imputed to the defendant by examining the nature of the contract itself.[76]

Under the traditional common law approach, courts usually do not consider home construction contracts as personal contracts permitting emotional distress damages.[77] However, the Alabama Supreme Court, in *B & M Homes, Inc. v. Hogan*, held that "contracts dealing with residences are in a special category and are exceptions to the general damage rule applied in contract cases which prohibits recovery for mental anguish."[78] A hairline crack developed on the concrete slab of a new home, and eventually widened and extended through the whole house. The damage was irreparable and the house's value severely decreased. The jury awarded damages of $75,000, double the purchase

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[74] 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (1970).

[75] *Id.* at 852, 88 Cal. Rptr. at 44; Newell v. Canadian Pac. Airlines, 74 D.L.R.3d 574 (Ont. County Ct. 1976) (great concern for pets indicated to airline representatives); *see also* Stifft's Jewelers v. Oliver, 284 Ark. 29, 30, 678 S.W.2d 372, 373 (1984) (no recovery when defendant not aware of sentimental value of rings); *cf.* Turner v. Jatko, 93 D.L.R.3d 314, 317 (B.C. County Ct. 1978) (sentimental attachment to real property unforeseeable absent specific information when tenant failed to keep premises in good repair).

[76] Objects involved in weddings are included in this category. *See* Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903) (bride's trousseau); Dieson v. Samson, 1971 Scot. L.T. 49 (Sheriff's Ct.) (wedding pictures). *But see* Levin v. Halston Ltd., 91 Misc. 2d 601, 398 N.Y.S.2d 339 (Civ. Ct. 1977) (bride's mother's gown for wedding); Seidenbach's, Inc. v. Williams, 361 P.2d 185 (Okla. 1961) (wedding gown and veil).

[77] *But see* Quedding v. Arisumi Bros., Inc., 66 Haw. 335, 661 P.2d 706 (1983) (emotional distress damages available for wanton and reckless breach); Randa v. U.S. Homes, Inc., 325 N.W.2d 905 (Iowa 1982) (emotional distress damages allowed on tort theory not contract).

[78] 376 So. 2d 667, 672 (Ala. 1979). *See* Comment, B & M Homes, Inc. v. Hogan: *A Breakthrough in the Law's Reluctance to Award Damages in Contract for Mental Anguish and Other Non-Economic Detriments*, 26 S.D.L. REV. 48 (1981). *See generally* Annotation, *Recovery for Mental Anguish or Emotional Distress, Absent Independent Physical Injury, Consequent upon Breach of Contract or Warranty in Connection with Construction of Home or Other Buildings*, 7 A.L.R.4th 1174 (1981).

price and almost $33,000 more than the highest appraisal. The award was upheld on appeal. The court stated that the contract was one dealing with "matters of mental concern or solicitude or with the feelings of the party."[79] The court reasoned that extreme mental anguish would foreseeably result if a newly constructed house had such severe defects, particularly since a home is the American family's largest single investment and places the purchaser in debt for a long period of time.[80]

The Louisiana Supreme Court reached the opposite result in *Ostrowe v. Darensbourg*.[81] In that case, the plaintiffs sued the contractor for failing to construct their residence in accordance with the plans and specifications and within the time stipulated. They sought $300,000 damages for mental suffering, anguish and anxiety. The trial court rejected the demand for emotional distress damages. Under the Louisiana Code in effect at that time, parties could recover emotional distress damages when the contract's principal object was "intellectual enjoyment."[82] On appeal, the Louisiana Supreme Court held that the con-

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[79] *B & M Homes*, 376 So. 2d at 671-72. Another exception is contracts for medical care. *See* Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369, 374-75 (Ala. 1981). Generally, no exception is made for insurance contracts. *See* National Sec. Fire & Casualty Co. v. Vintson, 414 So. 2d 49, 52 (Ala. 1982) (fire insurance); Sanford v. Western Life Ins. Co., 368 So. 2d 260, 264 (Ala. 1979) (disability insurance); Stead v. Blue Cross-Blue Shield, 346 So. 2d 1140, 1143 (Ala. 1977) (medical insurance). However, emotional distress damages are available if there is a bad faith tort. *See* Chavers v. National Sec. Fire & Casualty Co., 405 So. 2d 1, 7 (Ala. 1981) (fire insurance); Blan, *The Tort of Bad Faith — A Defense Viewpoint*, 34 ALA. L. REV. 543 (1983); Heninger, *Bad Faith in Alabama: An Infant Tort in Intensive Care*, 34 ALA. L. REV. 563 (1983). Courts have not extended this tort beyond insurance cases. *See, e.g.*, Gaylor v. Lawler Mobile Homes, Inc., 477 So. 2d 382 (Ala. 1985) (sale of mobile home); Hall v. Hall, 455 So. 2d 813, 815 (Ala. 1984) (divorce agreement); Kennedy Elec. Co. v. Moore-Handley, Inc., 437 So. 2d 76, 81 (Ala. 1983) (contract to supply electrical equipment).

[80] *B & M Homes*, 376 So. 2d at 672.

[81] 377 So. 2d 1201 (La. 1979).

[82] Louisiana Civil Code article 1934 provided that "[w]here the contract has for its object the gratification of some intellectual enjoyment . . . damages are due for their breach." LA. CIV. CODE ANN. art. 1934 (West 1977). The Louisiana Supreme Court held this to mean "a *principal* object of the contract . . . ." Meador v. Toyota, 332 So. 2d 433, 437 (La. 1976); *see* Johnson III, *Recovery of Non-pecuniary Damages for Breach of Contract*, 38 LA. L. REV. 345 (1978); Litvinoff, *Moral Damages*, 38 LA. L. REV. 1 (1977); Loulter, *Recovery for Mental Anguish Under Louisiana Civil Code Article 1934 (3)*, 23 LOY. L. REV. 229 (1977); Note, *Nonpecuniary Damages in Breach of Contract: Louisiana Civil Code Article 1934*, 37 LA. L. REV. 625 (1977). *See generally* Comment, *Damages* Ex Contractu: *Recovery of Nonpecuniary Damages for Breach of Contract Under Louisiana Civil Code Article 1934*, 48 TUL. L. REV. 1160 (1974).

tract's principal object, "as with most contracts to construct dwellings, was to build a structure used as a residence by the plaintiffs."[83] The court conceded that "intellectual enjoyment" was a possible object of such a contract, but was only incidental here. In sum, the physical construction of shelter, health, and comfort were the overriding concerns.[84]

This case is distinguishable from *B & M Homes* in the severity of damage caused by the breach. In *B & M Homes*, the breach rendered the house close to worthless; in *Ostrowe*, the breach caused a two-month delay in moving in. Even so, the Alabama court viewed the construction of a house as the embodiment of all of a prospective homeowner's expectations — a home, "a castle."[85] To the contrary, the Louisiana court determined a house is just a house.

Home ownership traditionally has been part of the "American dream," and owning a home has an emotional aspect. Although those who construct homes are aware of the emotional attachment most people have to their homes, a contractor in some cases would not likely foresee emotional distress resulting from the breach. For instance, when the promisee plans to rent or sell the new home for profit, emotional distress is not a foreseeable result.

Several factors will influence whether a home construction contract involves an emotional object: whether the home is custom designed, whether the home is the promisee's first home, and whether the home is very costly. When the house is custom designed, the contractor will more likely know of an emotional attachment. The promisee already has spent time creating her dream with an architect.[86] When the house is not built to specifications and the damage is irreparable, as in *B & M Homes*, the contractor can surely foresee emotional distress. Similarly, when a person purchases a home for the first time, whether newly constructed or already constructed, the promisor can anticipate the likely emotional attachment.[87]

Whether a home's price should enter into the emotional object deter-

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[83] *Ostrowe*, 377 So. 2d at 1203.

[84] *Id.*

[85] *B & M Homes*, 376 So. 2d at 672, (quoting F. Becker Asphaltum Roofing Co. v. Murphy, 224 Ala. 655, 141 So. 630 (1932) (leaking roof caused extreme emotional distress)). *But see* Caubarreaux v. Hines, 442 So. 2d 898, 901 n.4 (La. Ct. App. 1983) (mental anguish damages precluded in faulty construction of swimming pool); McLendon Pools, Inc. v. Bush, 414 So. 2d 92, 95 (Ala. Civ. App. 1982) (rule not extended to construction of swimming pool).

[86] *See generally* T. KIDDER, HOUSE (1985) (case study of custom built home).

[87] Purchasing a home for the first time could also create an emotional interest. *See infra* text accompanying notes 137-39.

mination is more problematic. The magnitude of the investment and the length of time for repayment of the debt were clearly factors in *B & M Homes*.[88] But these factors were not considered in *Ostrowe*, in which the house's value in 1975 was over $150,000. The house's cost relates more to the degree of the resulting distress than to emotional attachment. Purchasing a home, whatever its cost, fulfills a dream for most Americans. If the construction contract is breached, the contractor can foresee emotional distress on the basis of that emotional attachment. If the breach results in loss of the investment, this may add to the emotional distress. An object's cost in itself does not create an emotional attachment. Although some people feel greater pride from purchasing an expensive home, it is because their dream includes not only a castle but a mansion. Therefore, courts should not necessarily deem that factor as known to the promisor.

The most significant problem with the Louisiana rule in *Ostrowe* was the difficulty of determining whether intellectual enjoyment predominated over other concerns.[89] Because *Ostrowe* left open the possibility that "intellectual enjoyment" is an object in a particular home construction contract, the intermediate appellate level has produced confusing and contrary results. For instance, in deciding whether an addition to a home had intellectual enjoyment as its principal object, the Louisiana Court of Appeal in the Second and Fourth Circuits reached opposite conclusions on very similar facts. In *Gaines v. Phills*,[90] the court of appeal reversed a $1000 award for mental anguish against a building contractor who botched the remodeling and addition to the Gaines' home. The court found *Ostrowe* dispositive because the evidence showed that the principal object was simply the remodeling and enlarging of the house rather than any intellectual gratification.[91]

In a very similar case, *Ducote v. Arnold*,[92] great inconvenience resulted from the contractor's faulty workmanship and failure to complete the work on an addition to the plaintiffs' home. The Fourth Circuit Court of Appeal allowed emotional distress damages for two reasons.

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[88] *B & M Homes*, 367 So. 2d at 672.

[89] Litvinoff, *supra* note 82, at 17.

[90] 389 So. 2d 445 (La. Ct. App. 1980).

[91] *Id.* at 450-51; *accord* Hartner v. Executive Indus., Inc., 424 So. 2d 274 (La. Ct. App. 1982) (repair to motorhome); LeBlanc v. Robertson, 396 So. 2d 993 (La. Ct. App. 1981) (construction of addition to residence); Betz v. Reynaud Constr. Co., 396 So. 2d 412 (La. Ct. App. 1981) (repair to rafters); *see also* Emond v. Tyler Bldg. & Constr. Co., 438 So. 2d 681 (La. Ct. App. 1983) (construction of foundation of home).

[92] 416 So. 2d 180 (La. Ct. App. 1982).

First, the court found the defendant's breach "quasi-tortious."[93] Second, the emotional distress was real, substantial, and clearly proven.[94] The trial court had found that the addition to the home was for the "convenience of plaintiffs and not for the hope of profit but for the betterment of family life."[95] The breach resulted in inconvenience instead:

> [L]ack of air conditioning during the summer and heat during the winter; inability to do laundry because of no electricity for the washer and dryer; having the home open to vandalism; mosquito and roach problems due to removal of outside walls; lack of kitchen facilities; washing dishes in the bathtub; groceries stored in boxes; the necessity of their twelve-year-old son to sleep in their bedroom.[96]

The *Ducote* case represents a departure from *Ostrowe*'s requirement based on the nature of the contract. In reality, the court found it appropriate to compensate the plaintiffs' extreme discomfort regardless of the legal test. This demonstrates that *Ostrowe* was too categorical in its rejection of emotional distress damages for home construction contracts.

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[93] *Id.* at 185. The court referred to the dissent of now Chief Justice Dixon in the seminal case of Meador v. Toyota, 332 So. 2d 433, 438 (La. 1976), and noted that there may be "no logical reason to deny recovery simply because the cause of action is delineated as 'contract.' " *Ducote*, 416 So. 2d at 185. The doubtful utility of this rule is not limited to contracts concerning homes. In Pike v. Stephens Imports, Inc., 448 So. 2d 738 (La. Ct. App. 1984), a case involving delay and faulty workmanship in repair of a car, the court of appeal took the same stance it did in *Ducote*. Contrary to *Meador*, the court held that "a plaintiff, upon sufficient proof, may recover damages for inconvenience, loss of use, aggravation, delay, and mental anguish for negligent breach of a repair contract, irrespective of the intellectual or physical nature of the contract's principal object." *Id.* at 743. The court also tried to distinguish *Meador* on the facts. It stated that *Pike* involved delay and faulty repairs; the plaintiff waited a year for his car to be repaired and then had to return it five times to remedy defects. *Id.* at 743-44. Again, severity of the breach and the distress dictated departure from the *Meador* rule. *Accord* Bourne v. Rein Chrysler-Plymouth, Inc., 463 So. 2d 1356 (La. Ct. App. 1985) (egregious defects in new car that were not repaired, emotional distress damages allowed). *Contra* Williamson v. Alewine, 417 So. 2d 64 (La Ct. App. 1982) (repair of truck is not for intellectual enjoyment).

[94] *Ducote*, 416 So. 2d at 185. The court noted the supreme court case of Gele v. Markey, 387 So. 2d 1162 (La. 1980), in which the court opened the door slightly to emotional distress damages in a commercial context. *Id.* at 1164. In *Gele*, an elderly couple had a grocery store in a building where they leased space. The ceiling collapsed, damaging most of their merchandise and equipment. Ultimately they closed their business. The court rejected the award made by the trial court because the plaintiffs inadequately proved emotional distress. But the court stated that such awards, although rare, would be "appropriate only if the damages were clearly proven." *Id.*

[95] *Ducote*, 416 So. 2d at 183.

[96] *Id.* at 185.

Under the emotional object test, the determining factor is the promisee's emotional attachment to the addition or improvement to the home.[97] This emotional attachment is not as clear as it is for the construction of a custom built home. Rather than creating a "dream" house from scratch, the homeowner may seek to convert her home into that "dream" house. However, the owner may simply want more room or more convenience in an existing home. The key question then is whether "convenience and comfort" are sufficient emotional interests to warrant damages when breach of a home construction job creates exactly the opposite.

The *Ostrowe* court considered "comfort and convenience" as concerns for the family's physical health and comfort rather than mental concerns.[98] However, comfort and convenience have mental as well as physical aspects. The best answer is that the emotional attachment in a home improvement contract is not as strong as in construction of a new home, but that it can exist. Under the emotional object test, the damages for emotional distress should reflect the strength of the emotional attachment instead of precluding such damages completely.

When the owner seeks to beautify a home, an item purchased for the home may become an emotional object. In Louisiana, courts have made an exception to the *Ostrowe* rule when the contract involved interior decoration. The intellectual enjoyment in those types of contracts is clearly aesthetic in nature. In *McManus v. Galaxy Carpet Mills, Inc.*,[99] the plaintiffs purchased carpet for their new home. Mrs. McManus selected the color "Touch of Velvet, Pearl Gray" to coordinate with their home's color scheme. Due to a fault in the dye, the carpet developed green spots. Because Mrs. McManus was in an interior design business, she expected her home to reflect her good taste, but the carpet gave the opposite appearance. The trial court found that the contract's principal object was intellectual enjoyment and noted that the breach "affected only the aesthetic sense of Mr. and Mrs. McManus and diminished their pride in their home."[100] An appeals court upheld

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[97] *Compare* Fuentes v. Perez, 66 Cal. App. 3d 163, 136 Cal. Rptr. 275 (1977) (roof repair) *with* Rosener v. Sears, Roebuck & Co., 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (1980) (home improvement).

[98] *Ostrowe*, 377 So. 2d at 1203.

[99] 433 So. 2d 854 (La. Ct. App. 1983).

[100] *Id.* at 858-59. In a vigorous dissent, Judge Guidry found the majority's holding at odds with *Ostrowe*: "it is incongruous to hold that one cannot recover non-pecuniary damages for defects in a 'distinctively designed home' but that one can recover damages if it be established that there are defects in the flooring or carpeting installed in that home." *Id.* at 863.

the $3500 emotional distress award.

Similarly, in *B & B Cut Stone Co. v. Resneck*,[101] the court upheld a $5000 emotional distress damage award from the breach of a contract to install a marble fireplace in the plaintiff's home. The court concluded that the contract's principal object was indeed aesthetic.[102] Mrs. Resneck chose the marble for its beauty and elegance, matched her furniture to the marble's color, and intended to use the fireplace as a backdrop for their modern paintings. Clearly, the fireplace had no function "pertinent to burning wood."[103]

Under the emotional object test, Mrs. McManus' carpet has an emotional attachment because the promisor knew that she was in the interior design business. A promisor might reasonably expect that an interior designer would want a beautiful home. This would transform an object with little emotional value into one in which beauty was a reason for the purchase in that particular contract. Although the Resnecks were not interior designers, the purchase of a marble fireplace for a bedroom in Louisiana was probably purchased for its beauty, not its utilitarian value. In neither case was it necessary to explain specifically to the promisor that the promisee had an emotional attachment to the object purchased.

In conclusion, the emotional object test would allow for the possibility of emotional distress damages in cases dealing with home construction, improvement, and decoration. When an object has emotional or aesthetic value to a promisee that is known to the promisor, courts should make emotional distress damages available upon breach.

III. Emotional Interests

The third part of the emotional aspect test defines contracts having an emotional interest. When an emotional interest is known or imputed to a promisor at the time of contracting, the promisor can anticipate that emotional distress will flow from a breach. Emotional interest is patterned in part after the new Louisiana Statute Article 1998:

> Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract the obligor knew, or should have known, that his failure to perform would cause that kind of loss.[104]

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[101] 465 So. 2d 851 (La. Ct. App. 1985).

[102] *Id.* at 859.

[103] *Id.*

[104] Erosion of the "intellectual enjoyment" rule led the Louisiana Legislature to

Article 1998 overrules the "principal or exclusive object" requirement[105]and substitutes "because of its nature, [the contract] is intended to gratify a nonpecuniary interest."[106] Therefore, if a nonpecuniary interest is a purpose in a contract, courts should consider the possibility of emotional distress damages.[107] What then is a "nonpecuniary interest"? Article 1998's legislative comments define such interest as "an interest of a spiritual order, such as a contract to create a work of art, or a contract to conduct scientific research, or a contract involving matters of sentimental value."[108] Applying the analysis to home contracts, clearly a new home and interior decoration fall into this category. Contracts involving additions to homes and repairs are less likely to involve such an interest.

Article 1998 also includes a "knowledge" provision requiring that the obligor have actual or constructive knowledge that emotional distress will result "because of the circumstances surrounding the formation or the nonperformance of the contract."[109] An example of knowledge at the time of formation is when the promisee informs the promisor that the object of the contract has sentimental value.[110] For instance, a jeweler would have actual knowledge that emotional distress would occur if told that a ring needing repair is a family heirloom.[111] Likewise, a dressmaker would have constructive knowledge that emotional distress would occur if a bride's trousseau was not completed on time.[112] The knowledge "because of circumstances surrounding the nonperformance of the contract" is illustrated by the home construction cases. When the circumstances are not corrected in a timely fashion, the

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amend the orignal statute and eliminate the phrase "intellectual enjoyment." The legislature repealed Article 1934(3), 1984 LA. ACTS 331 § 1, effective Jan.1, 1985. The legislature substituted new Article 1998.

[105] Meador v. Toyota, 332 So. 2d 433, 437 (La. 1976).

[106] LA. CIV. CODE ANN. art. 1998, comment (a) (West 1986).

[107] The legislature has adopted in part the suggestions made by Professor Litvinoff. *See* Litvinoff, *supra* note 82, at 17.

[108] LA. CIV. CODE ANN. art. 1998, comment (c) (West 1986). Litvinoff, *supra* note 82, at 3.

[109] LA. CIV. CODE ANN. art. 1998 (West 1986); Litvinoff, *supra* note 82, at 23-26. Professor Litvinoff actually advocated that these circumstances may allow the awarding of emotional distress damages even if the contract did not involve an interest of a nonpecuniary nature. It seems that the legislature relaxed the requirement on nonpecuniary interest, but has incorporated a stricter requirement of foreseeability.

[110] *See supra* text accompanying notes 74-76.

[111] Windeler v. Scheers Jewelers, 8 Cal. App. 3d 844, 851-52, 88 Cal. Rptr. 39, 44 (1970).

[112] Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903).

obligor would know or should know that emotional distress would result.[113]

This new statute is a better basis for deciding whether emotional distress damages are appropriate when a contract is breached. Although its language is somewhat awkward, the statute eliminates the difficulties associated with determining whether intellectual enjoyment predominates. New difficulties may arise in defining a nonpecuniary interest notwithstanding the legislative comments.

For common law jurisdictions, the phrase "because of circumstances surrounding the nonperformance of the contract" also causes difficulties. This requirement conflicts with the *Hadley* principle that damages must be foreseeable at the time of contracting, not at breach. Under *Hadley*, this allows the promisor to decide either to refuse to contract or insure against the risk. Therefore, under common law contract theory, knowledge at the time of breach of potential emotional distress would not provide an adequate basis on a contract theory for emotional distress damages.[114]

A. Weddings and Vacations: The Creation of Happiness

Under the emotional interest part of the emotional aspect test, emotional distress damages are available if the contract involves creating happiness or security. This is similar to the new Louisiana Civil Code formulation,[115] but is more specific about the definition of an emotional interest.

In some cases, the application of the emotional interest test is identical to the emotional event test. However, under the emotional interest test, the contracts focus on creating a particular emotion rather than alleviating a distressing emotional event. For instance, a contract with a band to provide music at a wedding is intended to create a memorable event for the bride, groom, their families, and friends. The wedding itself is the emotional event and would, under the emotional event test, trigger the performance of the contract. The promisee has an emotional

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[113] Pike v. Stephens Imports, Inc., 448 So. 2d 738, 743 (La. Ct. App. 1984) (one-year wait for repair and final repairs 3.5 years later); McManus v. Galaxy Carpet Mills, Inc., 433 So. 2d 854 (La. Ct. App. 1983) (no redress for 3.5 years); Ducote v. Arnold, 416 So. 2d 180 (La. Ct. App. 1982) (work taking a month was not completed after 10 months).

[114] This would not, however, preclude tort remedies. *See* Fuentes v. Perez, 66 Cal. App. 3d 163, 166, 136 Cal. Rptr. 275 (1977); Randa v. U.S. Homes, Inc., 325 N.W.2d 905, 907 (Iowa 1982).

[115] *See supra* text accompanying notes 104-14.

reason for desiring the contract, which is to enhance the happiness surrounding the marriage.

Courts have long compensated disappointments of the bride and groom on a breach of contract theory.[116] A recent example is the Ohio case of *Deitsch v. Music Co.*, [117] in which the band failed to arrive at a wedding reception and music finally was obtained when a friend brought some stereo equipment to the reception hall. The plaintiffs were awarded $815, which included return of their $65 security deposit and an additional $750 for their "distress, inconvenience, and the diminution in value of their reception."[118]

Similarly, creating a memorable event is also a purpose in a contract for a vacation.[119] The promisee, as in a wedding party, has an emo-

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[116] *See, e.g.*, Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903) (bride's trousseau); Diesen v. Samson, 1971 Scot. L.T. 49 (Sheriff's Ct.) (wedding pictures).

[117] 6 Ohio Misc. 2d 6, 453 N.E.2d 1302 (Mun. Ct. 1983).

[118] *Id.* at 8, 453 N.E.2d at 1303. The original contract specified that the band would be paid $295. The plaintiffs claimed that the correct measure of damages would be $2643.59, the entire cost of the reception. The defendants countered that the proper measure was what the plaintiffs actually lost, a $65 deposit.

[119] The major English case extending the availability of emotional distress damages to contracts involved a vacation. *See* Jarvis v. Swans Tours, [1973] 1 Q.B. 233, [1973] 1 All E.R. 71. *Jarvis* involved a claim for breach of contract for a skiing holiday in Switzerland. Jarvis had looked forward to this holiday and had made arrangements far in advance. The defendant tourist operator had made glowing representations in a brochure about the two week holiday for a total price of £63. The defendant promised Jarvis fine skiing facilities and social activities. Jarvis was extremely disappointed with the inferior accommodations; his holiday was a disaster. The defendant had clearly breached its contract, but the question on appeal concerned damages. The trial court had awarded Jarvis one half of the cost of his tour.

The first question was whether the court could award contract damages for emotional distress. *Id.* at 237, 1 All E.R. at 74. At that time, the rule was that damages could not be awarded for "disappointment of mind occasioned by the breach of contract" without "real physical inconvenience resulting." *Id.* Lord Denning considered those limitations out of date and stated, "In a proper case damages for mental distress can be recovered in contract . . . [o]ne such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment." *Id.* These damages included compensation for the "disappointment, the distress, the upset and frustration caused by the breach." *Id.*

The next question involved the measure of damages. The court of appeal rejected the trial court's award of half the amount of the cost of the trip. The trial court's award represented the difference between what the plaintiff paid and what he received plus two weeks of the plaintiff's salary. Recognizing that it is difficult to assess the loss of entertainment and enjoyment, the court awarded £125, nearly twice the price paid for the skiing tour. *Id.* at 238, 1 All E.R. at 74-75; *see also* Hunt v. Hourmont, 1983 C.L.Y. 983 (£60 awarded to pupils for diminution in value and loss of enjoyment; from £110 to £210 awarded to teachers because of added responsibility, work, and unpleas-

tional interest because she desires enjoyment of the time spent on vacation. She anticipates a pleasant time that will yield memories in the future. When a promisor breaches, the promisor can anticipate emotional distress. In both situations, replicating the actual ceremony and particular vacation cannot occur at a later time.

New York has held travel agents liable for emotional distress damages under a contract theory.[120] In *Odysseys Unlimited, Inc. v. Astral*

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antness due to unacceptable accommodations that spoiled their holiday); Rhodes v. Sunspot Tours, 1983 C.L.Y. 111 (£1000 included the total waste of the £777 price of the holiday and discomfort, distress and upset to the family when the holiday was spoiled due to filthy accommodations); Askew v. Intasun North, 1980 C.L.Y. 637 (£300 awarded for assault on feelings when a holiday was ruined because plaintiff and his family were forced to stay in an unacceptable hotel); Levine v. Metro. Travel, 1980 C.L.Y. 638 (£100 awarded to each plaintiff for assault on feelings when a holiday was ruined because of substantial refurbishment work under way at their hotel); Webster v. Johnson, 1979 C.L.Y. 740 (£25 awarded for hurt feelings when landlady refused to accommodate a Pakistani because of his race); Scott & Scott v. Blue Sky Holidays [1985] 4 C.L. 76 (£400 awarded when a family received poor treatment at a four-star hotel); Taylor v. Int'l Travel Serv., [1984] 9. C.L. 59 (£1300 awarded for loss of enjoyment when plaintiffs were forced to spend part of their holiday in an inferior villa because the one they had originally booked, which was of exceptional quality, was double-booked); Abbatt v. Sunquest Holidays, [1984] 10 C.L. 64 (£1000 awarded for diminution in value and loss of enjoyment when a family's holiday was spoiled due to filthy and cramped motel conditions); Bagley v. Intourist Moscow, [1984] 5 C.L. 100 (£154 in special damages awarded when defendant travel agent failed to inform plaintiff of Japan's entry requirements resulting in plaintiff being refused entry); Watt v. Thompson, [1983] 2 C.L. 112 (£237 awarded, partially for assault on feelings when vacationing plaintiffs received shabby and unclean accommodations); Harvey v. Tracks Travel, [1983] 2 C.L. 112 (Had the claim not been limited to £3000, plaintiff could have received aggravated damages beyond the limit when she was stranded in central Africa for five months rather than enjoying an escorted 14-week tour; plaintiff became stranded when the truck on which the group was traveling broke down and no alternative form of transportation was offered or provided). *See generally* Burrows, *Mental Distress Damages in Contract — A Decade of Change*, 1984 LLOYD'S MAR. & COMM. L. 119, 123-24.

[120] *Accord* Vick v. National Airlines, Inc., 409 So. 2d 383 (La. Ct. App. 1982). In Bucholtz v. Sirotkin Travel, Ltd., 74 Misc. 2d 180, 343 N.Y.S.2d 438 (Dist. Ct. 1973), *aff'd*, 80 Misc. 2d 333, 363 N.Y.S.2d 415 (1974), the court found the travel agent liable under a tort theory. *Bucholtz* is the typical story of a vacation gone wrong. Mr. and Mrs. Bucholtz arranged for a three-day trip to Las Vegas. When they arrived, the hotel had no reservations for them and their baggage was misplaced. They had to find alternative accommodations, which caused additional expense and inconvenience. On their return, they sued their travel agent. The court quickly resolved the problems of agency. *Id.* at 181, 343 N.Y.S.2d at 440-41. It found that the agent owed a duty to its client similar to an innkeeper, common carrier, or insurer. *Id.* The agent failed to use reasonable care in confirming the Bucholtz' reservations and was liable for one-third of the total price paid for the vacation. *Id.* at 182, 343 N.Y.S.2d at 443. *See* Wohlmuth,

Travel Service,[121] two families' long-awaited trip to the Canary Islands was ruined. After arriving in the Canary Islands at dawn after a thirty-hour trip, the families, including five children, waited two hours before they were taken to their hotel. The hotel had no accommodations for them or the other 250 travelers in their group. The two families ultimately stayed at another hotel that was under construction. Throughout their stay, the families had water and electricity only intermittently. They demanded the return of the total cost of their trips, as well as $10,000 for the great inconvenience, humiliation, and pain suffered from spending their vacation in inferior accommodations. The court found that damages from breach of contract included "inconvenience, discomfort, humiliation, and annoyance."[122]

A more recent case is *Bogner v. General Motors Corp.*[123] On an automobile trip to Nova Scotia, the plaintiff's new Buick broke down. After one dealer attempted to fix it, the car broke down again and was towed to another dealer. The necessary part was unavailable in Canada, so GM sent it from New York by courier. However, GM sent the wrong part, which caused further delay. When the plaintiff returned from "being stuck for three days in a provincial backwater,"[124] she sued GM for failing to provide reasonably prompt warranty service.

GM contended that damages for discomfort, disappointment, and mental anguish were not a proper element of contract damages and that the warranty itself excluded such damages.[125] The court rejected GM's arguments and awarded the plaintiff $200. The court concluded that the damages were foreseeable since:

> [I]t is only reasonable for GM to assume that the cars it sells will be driven throughout the United States and Canada and that if one should break down on a touring vacation in a remote area, the purchaser will suffer at least an intangible but nonetheless real loss if the car is not given reasonably prompt warranty service.[126]

The Liability of Travel Agents: A Study in the Selection of Appropriate Legal Principles, 40 TEMP. L.Q. 29, 36-46 (1966); Note, *Recent Developments, Travel Agency Liable to Travelers When Its Failure to Confirm Reservations Ruins Vacation*, 74 COLUM. L. REV. 983, 984-93 (1974).

[121] 77 Misc. 2d 502, 354 N.Y.S.2d 88 (Sup. Ct. 1974).

[122] *Id.* at 505-06, 354 N.Y.S.2d at 91-92. The court awarded the families the total cost paid for the trip as damages for their emotional distress. *Id.* at 506-07, 354 N.Y.S.2d at 92-93.

[123] 117 Misc. 2d 929, 459 N.Y.S.2d 679 (Civ. Ct. 1982).

[124] *Id.* at 930, 459 N.Y.S.2d at 680.

[125] *Id.* at 930-31, 459 N.Y.S.2d at 680.

[126] *Id.* at 930, 459 N.Y.S.2d at 680.

The court emphasized the peculiar nature of vacations: "We live in time, time lost is irreplaceable."[127]

Concerning the exclusion in the warranty, the court found that the warranty did not exclude emotional distress damages. The court then stated that GM could certainly draft such an exclusion in the future.[128] However, the court suggested the possibility that such exclusions are contrary to public policy.[129]

These cases show that when a breach of contract leads to time lost in the much anticipated and often short-term vacation, perhaps plaintiffs are entitled to emotional distress damages. In the travel agent situation, the usual plaintiff has relied on the agent's knowledge and expertise to help plan enjoyment, comfort, and relaxation. When the agent breaches, the result is disappointment, discomfort, and annoyance. The award of emotional distress damages is appropriate since both parties could foresee that such damage would result from breach.

B. Insurance Contracts: The Creation of Security

Security or peace of mind is an emotional interest present in certain contracts, such as those involving insurance and employment. Insurance contracts provide security against financial loss before calamity strikes, and even if the risk insured against never occurs. This interest in secur-

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[127] *Id.* at 930-31, 459 N.Y.S.2d at 680. Cohen v. Varig Airlines, 85 Misc. 2d 653, 664, 380 N.Y.S.2d 450, 462 (Civ. Ct. 1975), *aff'd as modified*, 88 Misc. 2d 998, 390 N.Y.S.2d 515 (Sup. Ct. 1976), *modified*, 62 A.D.2d 324, 405 N.Y.S.2d 44 (1978), expressed this sentiment earlier. When the plaintiff's luggage was lost while on tour of South America: "[t]ime lost, delay in furtherance of a journey, and time spent in searching for property wrongfully withheld warrants a recovery therefor"; *see also* Kupferman v. Pakistan Int'l Airlines, 108 Misc. 2d 485, 489, 438 N.Y.S.2d 189, 192 (Civ. Ct. 1981) ("loss of a refreshing, memorable vacation").

[128] *Bogner*, 117 Misc. 2d at 931-32, 459 N.Y.S.2d at 680-81.

[129] *Id.* at 932-33, 459 N.Y.S.2d at 681; *cf.* Fendelman v. Conrail, 119 Misc. 2d 302, 464 N.Y.S.2d 323, 328 (County Ct. 1983) (disclaimer by common carrier against public policy). In cases concerning international airlines, the Warsaw Convention controls the extent of liability. The Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1929). This limit does not apply if there is "wilful misconduct." *Cohen*, 85 Misc. 2d at 655-56, 380 N.Y.S.2d at 455 (quoting Article 25(1) of the Warsaw Convention); *Kupferman*, 108 Misc. 2d at 488, 438 N.Y.S.2d at 191. *See generally* Grippando, *Warsaw Convention — Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter of Limits*, 19 GEO. WASH. J. INT'L L. & ECON. 59 (1985); Wohlmuth, *supra* note 120, at 53-56; Note, *Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of Lesion Corporelle*, 8 HASTINGS INT'L & COMP. L. REV. 339 (1985).

ity, coupled with an emotional event such as death or loss of health, demonstrates that life and disability insurance contracts have an emotional aspect.[130] The question remains whether this interest in security provides a basis for making emotional distress damages available in all insurance contracts.

The best answer is that the interest in security is sufficient because breach produces the exact opposite of what is purchased — assurance that in the event of calamity the financial aspect will not produce distress. However, if an emotional event is required and "event" is narrowly defined as exclusively related to the loss of life or physical health, courts could not award emotional distress damages for breach of liability and some fire insurance contracts. That exclusion denies the strong emotional interest most people have in financial security, which they try to protect through purchasing insurance.

First, consider liability insurance. As early as 1967, the California Supreme Court recognized that peace of mind and security were personal concerns "[a]mong the considerations in purchasing liability insurance."[131] In that case, *Crisci v. Security Insurance Co.*, the court emphasized that the contract's purpose was to protect against risks including mental distress rather than to obtain a commercial advantage.[132] Mrs. Crisci, "an immigrant widow of 70,"[133] was the owner of an apartment building in which a tenant was injured. After her insurance company refused to settle for the policy amount, a jury awarded the tenant ten times the amount of Mrs. Crisci's policy. As a result, Mrs. Crisci "became indigent," and suffered "a decline in physical health, hysteria, and suicide attempts."[134]

Under the emotional interest test, liability insurance shares, with life and disability insurance, an interest in security against financial loss. However, the event triggering performance is the filing of a lawsuit. Is this an emotional event? It does not deal with the insured's loss of life or physical health, but with the potential loss of an insured's financial security. Although the loss of material possessions differs from loss of life or health, it is hard to deny the anxiety and distress produced by

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[130] *See supra* text accompanying notes 42-57.

[131] Crisci v. Security Ins. Co., 66 Cal. 2d 425, 434, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967).

[132] *Id.* The court allowed emotional distress damages because there was also a tort involved. *Id.* This tort was the breach of the "duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." *Id.* at 430, 426 P.2d at 177, 58 Cal. Rptr. at 17.

[133] *Id.* at 429, 426 P.2d at 176, 58 Cal. Rptr. at 16.

[134] *Id.*

the prospect of such a loss. Mrs. Crisci's attempted suicide is evidence of the emotional reaction produced when an insurance contract is breached. The potentiality of financial loss coupled with the security of insurance[135] provides an adequate basis for the availability of emotional distress damages.

Concerning fire insurance, the emotional interest is again security against financial loss if property is damaged or destroyed. The security provided by the insurance provides a sufficient basis for emotional distress damages upon breach. Requiring an emotional event limited to loss of life or physical health could preclude the availability of emotional distress damages in fire insurance contracts on business property.[136]

Fire insurance on a home could meet the emotional event test.[137] The loss of a place to live or loss of part of a home can involve the physical health of a person and her family.[138] Considering the necessity of shelter and the possibility of losing life's usual amenities,[139] losing a home is certainly an emotional event. Therefore, even if courts required an emotional event, fire insurance on a family home has an emotional aspect.

The question then remains whether fire insurance on a business falls outside the emotional aspect test, thus precluding emotional distress damages on a contract theory. In *Gruenberg v. Aetna Insurance Co.*,[140] the California Supreme Court allowed emotional distress damages[141] in a case involving a fire insurance contract on a business. Mr.

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[135] This interest is surely known to insurance companies, since it is part of their advertising, *e.g.*, "Get a piece of the rock," "Like a good neighbor . . .," or "You're in good hands." Farris v. United States Fidelity & Guar. Co., 284 Or. 453, 479 n.4, 587 P.2d 1015, 1028 n.4 (1978) (Lent, J., dissenting); *see* Note, *Basis for Recovery*, *supra* note 58, at 1346-47.

[136] The same question could be raised concerning liability insurance on a business. Liability insurance can be provided on particular property, home, car or business, or for the individual in any context. A distinction should not be drawn on that basis because it is the liability of the owner rather than the actual property that is insured.

[137] It would also be possible to require an emotional object in addition to or instead of an emotional event. Here, a home is arguably an emotional object. It would be much harder to characterize business property as an emotional object.

[138] *Cf.* Westervelt v. McCullough, 68 Cal. App. 198, 228 P. 734 (1924) (contract for a home as long as desired); Guerin v. New Hampshire Catholic Charities, Inc. 120 N.H. 501, 418 A.2d 224 (1980) (contract for care in nursing home). *See supra* text accompanying notes 46-48.

[139] *See, e.g.*, Ducote v. Arnold, 416 So. 2d 180 (La. Ct. App. 1982). *See supra* text accompanying notes 92-97.

[140] 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).

[141] *Id.* at 578-81, 510 P.2d at 1040-42, 108 Cal. Rptr. at 488-90; *see also* Chavers

Gruenberg was the owner of a bar and restaurant known as the Brass Rail, where a suspicious fire occurred one night. Although Mr. Gruenberg was suspected of arson, the police dropped the charges against him. While the charges were pending, the insurance companies' lawyers demanded that Mr. Gruenberg appear for examination. He refused and requested waiver of the examination until the criminal matter was concluded. The insurance companies denied liability for failure to appear. Mr. Gruenberg then filed a complaint claiming emotional distress damages, which the court dismissed for failure to state a cause of action. On appeal, the California Supreme Court extended the *Crisci* rationale to every insurance contract.[142] This rule, however, also requires unreasonable conduct by the insurer.[143]

Under the emotional interest test, fire insurance in a business context creates the security that loss of property will not mean total financial ruin of the business. Even though profit motivates both parties,[144] the interest in security is identical to any other insurance contract. Businesses are not seeking profit from the insurance, but financial security if fire strikes. This distinguishes insurance contracts from other contracts seeking profit. Although avoiding a loss will increase profit, that is not the specific purpose in purchasing insurance.

Another peculiarity of insurance is that no amount of business deal-

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v. National Sec. Fire & Casualty Co., 405 So. 2d 1 (Ala. 1981) (bad faith tort allowed); Lawton v. Great Southwest Fire Ins. Co., 118 N.H. 607, 392 A.2d 576 (1978) (bad faith tort rejected).

[142] *Gruenberg*, 9 Cal. 3d at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486. This rationale was based on the breach of the implied covenant of good faith and fair dealing. *Id.* The *Gruenberg* decision firmly established the "bad faith" tort in insurance law in California. *See, e.g.*, White v. Western Title Ins. Co., 40 Cal. 3d 870, 710 P.2d 309, 221 Cal. Rptr. 509 (1985) (title insurance; failure to note encumbrance); Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979) (disability insurance; failure to properly investigate insured's claim); Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974) (medical insurance; failure to pay benefits because of insured's pending claim for worker's compensation); Merlo v. Standard Life & Accident Ins. Co., 59 Cal. App. 3d 138, 130 Cal. Rptr. 416 (1976) (disability insurance; failure to pay disabled worker); Truestone v. Travelers Ins. Co., 55 Cal. App. 3d 165, 127 Cal. Rptr. 386 (1976) (liability insurance; failure to settle suit); Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975) (title insurance; failure to take action to provide clear title). *But see, e.g.*, Blake v. Aetna Life Ins. Co., 99 Cal. App. 3d 901, 160 Cal. Rptr. 528 (1979) (life insurance; insurer acted reasonably); Austero v. National Casualty Co., 84 Cal. App. 3d 1, 148 Cal. Rptr. 653 (1978) (disability insurance; insurer acted reasonably).

[143] *Gruenberg*, 9 Cal. 3d at 575, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

[144] *See infra* text accompanying notes 155-68.

ing will prevent the calamity insured against. Cushioning the financial blow of a fire and permitting the business' continued existence requires insurance. Just as in any insurance contract, security is sought even if fire never strikes. If denied insurance benefits, the security created is then destroyed. This is particularly true when the businessperson is the sole owner or shareholder in a family business as in the *Gruenberg* case. Courts should consider this interest in security sufficient to allow the possibility of emotional distress damages.

Meeting the emotional event requirement in this situation would be difficult. The event triggering performance is fire damage to business property. This is far removed from the physical health of the individual or her family. Although the definition of emotional event may stretch to cover every financial catastrophe, recognizing the emotional interest in financial security in the area of insurance contracts is a better approach.

Therefore, the best answer in this situation is to acknowledge that all insurance contracts have an emotional interest: the creation of security against catastrophic financial loss. This interest would allow for the availability of emotional distress damages upon breach. The additional requirement of an emotional event would be an artificial attempt to limit the availability of emotional distress damages flowing from the breach of insurance contracts. Insurance contracts are a peculiar type of contract in which the creation of emotional security, albeit financial, is the central concern.

C. Employment Contracts and the Interest in Security

Employment contracts, particularly when long-term, have an emotional interest in security. The loss of any job, particularly through being fired,[145] may result in emotional distress. However, the interest in security is particularly strong in long-term employment. Even though the loss of financial security after termination is often cushioned by unemployment insurance, or by various pension rights if an employee is close to retirement, the loss of a job of many years will produce emotional distress.

The recent California case of *Wallis v. Superior Court*,[146] although brought under the rubric of a bad faith breach of the implied covenant

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[145] In the Social Readjustment Rating Scale, "Fired at Work" ranks eighth in the 43 major life events measured for their psychological stress. Note, *Basis for Recovery*, *supra* note 58, at 1364-65.

[146] 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984).

of good faith and fair dealing,[147] sheds light on this issue. Wallis worked for the Kroehler Manufacturing Company at its San Bernardino factory for thirty-two years. When the factory closed in 1979, Wallis learned that he would be laid off and he would not be eligible for pension benefits for another ten years. The company and Wallis agreed in writing that he would receive $600 per month for ten years in return for agreeing not to compete in the furniture business. The company made payments for three years then stopped, ostensibly due to a change in the company's financial condition and the lack of a legal obligation to pay. Wallis sued Kroehler and included causes of action for bad faith breach of the implied covenant of good faith and fair dealing and intentional infliction of emotional distress. Wallis appealed when the court sustained Kroehler's demurrer without leave to amend.

The court of appeal concluded that Wallis could state the bad faith cause of action because the contract presented characteristics similar to insurance contracts.[148] This particular contract was similar to insurance, primarily because of the plaintiff's age, lack of skills other than furniture manufacturing, and vulnerable financial position. Although not mentioned by the court, one factor was undoubtedly the length of

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[147] In Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984), the California Supreme Court did not extend the bad faith tort beyond insurance cases "into largely uncharted and potentially dangerous waters." *Id.* at 769, 686 P.2d at 1166-67, 206 Cal. Rptr. at 362-63. However, the court stated that other contractual relationships, such as employment contracts, are similar to insurance. *Id.* at 769 n.6, 686 P.2d at 1166 n.6, 206 Cal. Rptr. at 362 n.6. Earlier, in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 179 n.12, 610 P.2d 1330, 1337 n.12, 164 Cal. Rptr. 839, 846 n.12 (1980), the California Supreme Court indicated that a tort action based on a breach of the implied covenant of good faith and fair dealing would be available in an employment context. *See also* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

[148] *Wallis*, 160 Cal. App. 3d at 1116-19, 207 Cal. Rptr. at 127-29. The court delineated the characteristics making a contract similar to insurance:

> (1) the contract must be such that the parties are in inherently unequal bargaining positions; (2) the motivation for entering the contract must be a nonprofit motive, i.e., to secure peace of mind, security, future protection; (3) ordinary contract damages are not adequate, because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party 'whole'; (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability.

Id. at 1118, 207 Cal. Rptr. at 129.

service, thirty-two years, given to the company.[149] When an employee has worked for a company for that many years, the employment goes beyond the mere payment of wages for services relationship. When the criteria articulated by the court are met, "the party in the stronger position has a heightened duty not to act unreasonably in breaching the contract and to consider the interest of the other party as tantamount to its own."[150]

Under the emotional interest test, the *Wallis* case presents a very strong case for the availability of emotional distress damages. After thirty-two years with one company, Mr. Wallis would expect continuing employment or compensation if employment ended.[151] Kroehler knew that pension benefits were unavailable for another ten years and that Mr. Wallis faced only dubious prospects for securing another job. Because of specific knowledge of Mr. Wallis' situation, Kroehler could anticipate that he would suffer emotional distress on breach.

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[149] Most wrongful discharge cases have dealt with longterm employees. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (15 years); Foley v. Interactive Data Corp., 174 Cal. App. 3d 282, 219 Cal. Rptr. 866 (1985), *rev. granted*, ____ Cal. 3d ____, 712 P.2d 891, 222 Cal. Rptr. 740 (Jan. 30, 1986) (7 years); Clutterham v. Coachmen Indus., Inc., 169 Cal. App. 3d 1223, 215 Cal. Rptr. 795 (1985) (9 years); Wayte v. Rollins Int'l, Inc., 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (1985) (6 years); Rulon Miller v. IBM Corp., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (12 Years); Meyer v. Byron Jackson, Inc., 161 Cal. App. 3d 402, 207 Cal. Rptr. 663 (1984) (10 years); Crosier v. United Parcel Serv., 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983) (25 years); Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982) (5 years); Walker v. Northern San Diego County Hosp., 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982) (19 years); Williams v. Los Angeles Dep't of Water & Power, 130 Cal. App. 3d 677, 181 Cal. Rptr. 868 (1982) (13 years); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (32 years); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (18 years); *cf.* Blong v. Snyder, 361 N.W.2d 312 (Iowa App. 1984) (19 years; intentional infliction of emotional distress). ***But see*** Read v. City of Lynwood, 173 Cal. App. 3d 437, 219 Cal. Rptr. 26 (1985) (2 years); Santa Monica Hosp. v. Superior Ct., 172 Cal. App. 3d 698, 218 Cal. Rptr. 543, ***modified***, 173 Cal. App. 3d 348 (1985), ***hg. granted***, ____ Cal. 3d ____, 711 P.2d 520, 222 Cal. Rptr. 224 (Jan. 16, 1986), ***reprinted as modified at*** 182 Cal. App. 3d 878 (1986) (4 years); Khanna v. Microdata Corp., 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985) (2 years); Tyco Indus., Inc. v. Superior Court, 164 Cal. App. 3d 148, 211 Cal. Rptr. 540 (1985) (2 years); Newfield v. Insurance Co. of the West, 156 Cal. App. 3d 440, 203 Cal. Rptr. 9 (1984) (2 years); Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984) (3.5 years).

[150] *Wallis*, 160 Cal. App. 3d at 1118, 207 Cal. Rptr. at 129.

[151] In Valentine v. General Am. Credit, Inc., 420 Mich. 256, 263, 362 N.W.2d 628, 631 (1984), the Michigan Supreme Court recognized that all employment contracts have a personal element, but the "psychic satisfaction of employment is secondary."

The issue here is when this interest in security of continuing employment arises in a particular case. In some cases, objective criteria indicate such an interest. For instance, some judges receive life appointments,[152] and university professors receive lifetime tenure after a number of years. On the other hand, coaches of sports teams enjoy little security in continuing employment. Financial security is indicated for most employees after pension rights vest. However, the emotional interest in continuing employment may arise far earlier than the date pension rights vest. Courts may have to determine this interest on a case-by-case basis. Courts may also create an evidentiary presumption that an interest in security arises after five years.[153] After five years of employment, this interest in security arises unless the employer can show that security was specifically precluded. Prior to five years of employment, the employee has the burden of showing that an interest in security had arisen.[154]

D. Emotional Interests in Commercial Contracts

The presence of an emotional aspect in some employment contracts raises important questions concerning other business relationships. For instance, a corporation's hiring of an independent contractor for a particular service is in some ways analogous to an employer-employee relationship. If the contractor continues to perform this service over several years, she could argue that an interest in security arises.

However, the key determinant in this situation, as well as other contracts, is whether the particular contract is entered into for profit. If the contract is for profit, both parties undertake the possibility of ruin, financial as well as emotional, as the cost of achieving financial success. In a sense, they share expectations concerning performance and breach. If the contract is unprofitable, breach is expected and considered eco-

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[152] 28 U.S.C. § 44(b) (1982) (circuit court of appeals), 28 U.S.C. § 134(a) (1982) (district court).

[153] *See* Foley v. Interactive Data Corp., 174 Cal. App. 3d 292, 219 Cal. Rptr. 871 (1985), *rev. granted*, ____Cal. 3d ____, 712 P.2d 891, 222 Cal. Rptr. 740 (Jan. 30, 1986) (7 years insufficient); Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 478, 199 Cal. Rptr. 613, 619 (1984) (3.5 years insufficient). According to the most recent labor statistics, men have an overall median level of tenure of 4 years; women have 2.5. F. HORVATH & N. RYTINA, JOB TENURE AND OCCUPATIONAL CHANGE 1981 (United States Dep't of Labor, Bureau of Labor Statistics Bulletin No. 2162, Jan. 1983).

[154] This type of presumption is commonly used in family law cases. *See, e.g.*, CAL. CIV. CODE § 4800.3(c)(1) (West Supp. 1986) (presumption of 10 years for benefits of education).

nomically efficient.[155] Little, if any, security of performance exists if a better deal comes along.

The contract in *Quigley v. Pet, Inc.*[156] involved the performance of a service over a period of time. Quigley was the sole shareholder in a trucking company that started hauling nuts for Pet, Inc., in 1975. For the 1977 season, Quigley agreed to haul walnuts for the company at what is called the 8-A rate. This rate is almost twice as high as the 14-A rate, which Pet later claimed was the proper rate. During the harvest season, Quigley began hauling walnuts and billed Pet for $40,000, which Pet did not pay. Pet then advised Quigley by letter that they rescinded the agreement and that Pet would only pay at the lower rate. Quigley stopped hauling nuts. After further negotiations, Pet agreed to reinstate the contract at the higher rate. Quigley later sued Pet for unpaid amounts under the contract and for pain and suffering.[157]

The court held that "[t]here was no special relationship which removed the parties from usual commercial contract rules."[158] The parties entered into the contract for profit. No special trust existed between the parties; the employment was between independent contractors.[159] For these reasons, the court saw no reason to relax the rules concerning contract damages. Thus, the court reversed the damages for pain and suffering and remanded for a new trial.[160] The court used the personal/commercial distinction in refusing emotional distress damages. Under that reasoning, if a contract is commercial in the sense that both parties expect to profit, contract damages are sufficient compensation. Aggravation and emotional distress is expected if the reward of profit is involved.

The only argument supporting the appropriateness of emotional dis-

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[155] Diamond, *supra* note 41, at 433. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW 89-90 (2d ed. 1977); Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970); MacNeil, *Efficient Breaches of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); Rea, *Nonpecuniary Loss and Breach of Contract*, 11 J. LEGAL STUD. 35 (1982).

[156] 162 Cal. App. 3d 877, 208 Cal. Rptr. 394 (1984).

[157] On the contract claim, the jury awarded approximately $27,000. *Id.* at 887, 208 Cal. Rptr. at 398. For the bad faith breach, Quigley was awarded $592,800, which included damages for pain and suffering, as well as $3.8 million for punitive damages. *Id.* The award also included compensation for medical costs and lost earnings. *Id.* The major award was for punitive damages. *Id.* Although Quigley only prayed for $2 million, the jury awarded $3.8 million. *Id.* The bad faith award was reversed with the right to retrial. *Id.*

[158] *Id.* at 893, 208 Cal. Rptr. at 403.

[159] *Id.*

[160] *Id.* at 893-95, 108 Cal. Rptr. at 403-05.

tress damages under the emotional interest test is that Quigley had an emotional interest in security because he had dealt with Pet for three years. However, this argument would fail because hauling contracts were negotiated yearly and Quigley probably had no assurances that his services extended beyond that time. Even so, the contract dispute was strictly over the rate of pay, which ultimately determined the amount of Quigley's profit. Therefore, Quigley could not recover under a contract theory notwithstanding the genuine distress he suffered upon Pet's breach. In *Quigley*, both Mr. Quigley's business and the particular contract were for profit.

The remaining question is whether emotional distress damages are ever available in a business situation.[161] The rare commercial contract

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[161] Emotional distress damages are permitted when the conduct of the promisor is egregious. This approach is used by the Hawaiian courts when the "dispositive factor is . . . the wanton or reckless nature of the breach." Chung v. Kaonohi Center Co., 62 Haw. 594, 602, 618 P.2d 283, 289 (1980) (commercial lease in shopping center); *see, e.g.*, Trimble v. City & County of Denver, 697 P.2d 716, 731 (Colo. 1985) (willful, insulting or wanton conduct); *cf.* Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1272 (Colo. 1985) (unreasonable conduct and knowledge or reckless disregard). *See generally* RESTATEMENT OF CONTRACTS § 341 (1932) ("In actions for breach of contract, damages will not be given . . . for mental suffering except where the breach is wanton or reckless"). Similarly, California courts focus on the tortious breach of the covenant of good faith and fair dealing, which includes most commercial relationships. *See* Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984) (long-term lease to supply oil not within that covenant but still a tort of bad faith denial of existence of a contract); Wallis v. Superior Ct., 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984) (employment); Commercial Cotton Co. v. United Cal. Bank, 163 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1983) (banking). Other states allow emotional distress damages if a tort, *e.g.*, intentional infliction of emotional distress, can be proved. *See, e.g.*, Bossuyt v. Osage Farmers Nat'l Bank, 360 N.W.2d 769, 776-77 (Iowa 1985) (cashier's check); Vinson v. Linn-Mar Community School Dist., 360 N.W.2d 108, 119 (Iowa 1984) (employment); Harsha v. State Sav. Bank, 346 N.W.2d 791, 801 (Iowa 1984) (bank loan); Wambsgans v. Price, 274 N.W.2d 362, 365-66 (Iowa 1979) (sale of home); Blong v. Snyder, 361 N.W.2d 312, 316-17 (Iowa Ct. App. 1984) (employment); Randa v. U.S. Homes, Inc., 325 N.W.2d 905, 908 (Iowa Ct. App. 1982) (home construction). A detailed discussion of the relevance of the defendant's conduct to the awarding of emotional distress is beyond the scope of this Article. For a full discussion, see Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Diamond, *supra* note 41; Holmes, *Is There Life After Gilmore's Death of Contract? — Inductions From a Study of Commercial Good Faith in First-Party Insurance Contracts*, 65 CORNELL L. REV. 330 (1980); Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F. L. REV. 187 (1982); Note *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377 (1986); Comment, Seaman's Direct Buying Service, Inc. v. Stan-

may exist in which an individual[162] is not seeking profit[163] and the promisor has reason to know of an emotional aspect to the contract. This situation arose in *Commercial Cotton Co. v. United California Bank*,[164] in which the court of appeal allowed for the availability of emotional distress damages in a commercial checking account.[165] The

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dard Oil Co.: *Tortious Breach of the Covenant of Good Faith and Fair Dealing in a Noninsurance Commercial Contract Case*, 71 IOWA L. REV. 893 (1986); Comment, *Bad Faith Revisited: An Examination of Tort Law Remedies for Commercial Contract Disputes*, 34 U. KAN. L. REV. 315 (1985). *See generally* articles cited *supra* note 4.

[162] In Mooney v. Johnson Cattle Co., 291 Or. 709, 718-19, 634 P.2d 1333, 1338 (1981), the court rejected the possibility of emotional distress between corporate enterprises, but allowed for the possibility in business dealings between individuals. Although the plaintiff in this dispute over a cattle sale sued under the tort of interference with contractual relations, the Oregon Supreme Court was unwilling to preclude recovery for emotional distress in all commercial contracts. Instead, the court opted to view the custom in particular branches of business. *Id.* at 719, 634 P.2d at 1338. The court limited damages to the distress associated with the business itself, such as "the stress of finding another buyer or source of supply, of restoring confidence in the future performance of the business, or in case of more fatal interference, of selling or liquidating the enterprise," but would exclude "personal consequences such as a sacrificed vacation, financial stringency, or family stresses." *Id.* at 719-20, 634 P.2d at 1339.

The distinction based on the corporate form is easy to determine but is not realistic when dealing with individuals or small incorporated family-run companies. *E.g.*, Truestone, Inc. v. Travelers Ins. Co., 55 Cal. App. 3d 165, 170, 127 Cal. Rptr. 386, 389-90 (1976) (tort action allowed for shareholders of a closely held corporation).

[163] The Idaho Supreme Court in Hatfield v. Max Rouse & Sons Northwest, 100 Idaho 840, 847, 606 P.2d 944, 951 (1980), *reh'g denied*, Mar. 17, 1980, rejected the commercial/noncommercial distinction, opting instead to look at the facts of the particular case. The major question was whether the particular contract to auction logging equipment was "to secure monetary advantage" or "meant to insure each other's emotional tranquility." *Id.* at 847-48, 606 P.2d at 951-52. The promisor had no information before contracting to know of a "special susceptibility to emotional distress [of the promisee]." *Id.* at 848, 606 P.2d at 952. The court did not allow emotional distress damages. *Cf.* Eisenbarth v. Shearson Loeb Rhodes, Inc., 110 Misc. 2d 578, 442 N.Y.S.2d 754 (Sup. Ct. 1981) (no claim against stockbroker for emotional distress).

[164] 163 Cal. App. 3d 511, 209 Cal. Rptr. 551 (1985), *hg. denied*, Mar. 28, 1985. The court reversed emotional distress damages because the distress of the plaintiff was not "substantial or enduring as distinguished from trivial or transitory." *Id.* at 517, 209 Cal. Rptr. at 555, (citing Young v. Bank of Am., 141 Cal. App. 3d 108, 114, 190 Cal. Rptr. 122, 126 (1983)). The only evidence presented concerning the plaintiff's emotions showed anger, aggravation, irritation and upset. This was insufficient because those emotions were only "short lived." *Commercial Cotton*, 163 Cal. App. 3d at 516-17, 209 Cal. Rptr. at 555.

[165] *Commercial Cotton*, 163 Cal. App. 3d at 516, 209 Cal. Rptr. at 554. The court found that the bank breached its covenant of good faith and fair dealing. *Id.* This covenant applied because banks are similar to insurance companies under the standard requiring the elements of public interest, adhesion, and fiduciary duty. *Id.* at 516, 209

facts of *Commercial Cotton* are particularly relevant since the account was a commercial checking account that was noninterest bearing. The depositor was the principal shareholder in the Commercial Cotton Company, set up to facilitate the plaintiff's cotton ginning and cotton sale business. The bank breached the checking account agreement by paying a check with unauthorized signatures and refusing to reimburse the account. Under most tests, this would constitute a commercial contract, precluding emotional distress damages.

Under the emotional aspect test, the particular contract was not for profit because it earned no interest but facilitated plaintiff's profit making business by providing the "convenience of not having to conduct transactions in cash and the concomitant security in having the bank safeguard [the depositor's funds]."[166] When the bank paid a check without an authorized signature, this interest in security was not protected. Arguably, this was an emotional interest that would allow for the possibility of emotional distress damages.

On the other hand, the bank would argue that emotional distress damages were precluded because the checking account facilitated a profit making business. However, courts should examine the particular contract ultimately to determine the availability of emotional distress damages.[167] The account in question had the purpose of securing the plaintiff's funds, particularly since the account did not bear interest. The interest in security was part of the contract and that security was

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Cal. Rptr. at 554 (quoting from Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 789, 686 P.2d 1158, 1167, 206 Cal. Rptr. 354, 363 (1984)). In particular, banks are in a highly regulated industry that provides security for a depositor's funds. *Commercial Cotton*, 163 Cal. App. 3d at 516-17, 209 Cal. Rptr. at 554. The court also noted that another function of the bank is to provide convenience in conducting transactions. *Id.* The court found the bank's relationship "at least quasi-fiduciary." *Id.* The vast majority of bank services, such as loans, *e.g.*, Wagner v. Benson, 101 Cal. App. 3d 27, 161 Cal. Rptr. 516 (1980) (commercial loan), savings, and checking accounts, *e.g.*, Kendall Yacht Corp. v. United Cal. Bank, 50 Cal. App. 3d 949, 123 Cal. Rptr. 848 (1975) (checking account), involve financial transactions in which the customer is most concerned with the rate of interest or convenience. The depositor often takes the safety of funds for granted, particularly with the advent of deposit insurance. However, some bank contracts do involve an interest in security. One example is a contract for a safety deposit box. A bank has constructive knowledge that items of emotional value, such as valuable family heirlooms, or items of great financial worth, such as stock certificates, may be stored in those boxes. The consumer is not seeking any monetary advantage, but instead is seeking peace of mind that her treasures will be safe.

[166] *Commercial Cotton*, 163 Cal. App. 3d at 516, 209 Cal. Rptr. at 554.

[167] The business context may certainly influence the severity and valuation of damages, but should not preclude emotional distress damages entirely.

lost when the bank breached. Even though the account was used in a business, in this case the bank could anticipate emotional distress on breach.

Another commercial situation in which emotional distress damages would be available is when an emotional event triggers the contract's formation and the reason for the contract is specifically related to the promisor. One such instance is the Colorado case, *Smith v. Hoyer*,[168] in which the plaintiff requested an extension on a construction loan because of the death of the plaintiff's infant daughter. The construction loan itself clearly had a profit motive, to assist Smith in his home construction business. However, the extension was only to allow Smith time to complete the construction work. The death of Smith's daughter was clearly an emotional event that provided the reason for the extension contract. The bank officers who granted the extension were told about the problem specifically. Emotional distress damages certainly were foreseeable when the bank foreclosed and Smith lost the properties involved. In that case, the $125,000 emotional distress damages award was upheld.

In conclusion, when both parties are seeking profit courts should not award emotional distress damages. However, if the contract is similar to insurance in that a purpose is security against financial loss as opposed to financial gain, or if the promisee relates information about a specific emotional event to the promisor at the time of the contract's formation, emotional distress damages should be available.

CONCLUSION

The emotional aspect test broadens the availability of emotional distress damages when claimed on a contract theory.[169] In the area of consumer contracts, it provides a framework for determining when a businessperson has or should have knowledge of the contract's emotional aspects. When an emotional event, object, or interest is known, the

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[168] 697 P.2d 761 (Colo. Ct. App. 1984). Colorado law allows emotional distress damages if there is a willful and wanton breach. *Id.* at 764.

[169] When emotional distress damages are unavailable on a tort theory because the statute of limitations has run, they are not necessarily precluded under a contract theory. Guerin v. New Hampshire Catholic Charities, Inc., 120 N.H. 501, 505-06, 418 A.2d 224, 227-28 (1980). *But see* Levy v. Schnader, 96 A.D.2d 854, 855, 465 N.Y.S.2d 767, 768 (1983) (dismissing contract cause of action as attempt to overcome statute of limitations); Miller v. Indasco, Inc., 178 Cal. App. 3d 296, 299-300, 223 Cal. Rptr. 551, 552-53 (1986) (tort action barred by statue of limitations; contract action barred by statute of frauds).

businessperson can anticipate the possibility of emotional loss upon breach.

The major question raised by broadening the potential liability for emotional distress damages arising from a breach of contract is how to limit liability.[170] The answer is twofold. First, contracts in which both parties seek profit are excluded under the test. Therefore, the large majority of contracts between businesspersons would not carry the potential for compensating emotional loss. Second, the test requires actual or constructive knowledge, at the time of contracting, that emotional distress will result from breach. This should help to prevent fictitious claims and allow businesspeople to take steps to prevent the impact of potential liability. Although some dangers exist in expanding liability for emotional damage resulting from a breach of contract, the emotional aspect test gives guidance for determining when such liability is appropriate.

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[170] The prospect that all contract dealings will be free from damages traditionally reserved for tort law is illusory. The increasing recognition that a contract breach may also be either a tortious breach of the implied covenant of good faith and fair dealing, the tort of intentional infliction of emotional distress, or a wanton and reckless breach giving rise to tort damages, *see supra* note 161, underscores the courts' increased willingness to recognize that emotional security should be protected in many consumer transactions. Trying to compensate emotional distress damages strictly through a tort theory also raises the question of the availability of punitive damages. Although it is possible to differentiate between emotional distress damages as compensation and punitive damages for punishment and deterrence, it is not always easy to distinguish when each is appropriate. *E.g.*, Quedding v. Arisumi Bros., Inc., 66 Haw. 335, 661 P.2d 706 (1983); Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d 368 (1972). *See generally* Coleman, *Punitive Damages for Breach of Contract: A New Approach*, 11 STETSON L. REV. 250 (1982); Creedon, *Punitive Damages for Breach of Contract — Does the Punishment Fit the Crime?*, 4 DET. C.L. REV. 1149 (1983); Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 ARIZ. L. REV. 733 (1982); Riley, *Disciplining the Recalcitrant: Punitive Damages for Breach of Contract*, 57 N.Y. ST. B.J. 30 (1985); Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977); Comment, *Punitive Damages on Ordinary Contracts*, 42 MONT. L. REV. 93 (1981); Comment, *Remedies — Extra-Contractual Remedies for Breach of Contract in North Carolina*, 55 N.C.L. REV. 1125 (1977); Note, *Punitive Damages in Contract Actions — Are the Exceptions Swallowing the Rule?*, 20 WASHBURN L.J. 86 (1980).