JUDICIAL BROKEN-FIELD RUNNING *PERL V. ST. PAUL FIRE & MARINE INS. CO.*

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One of the fascinating aspects of insurance law is the degree to which courts feel empowered and even commissioned to fix on a desired result and then make it come true despite obstacles such as clear contractual language, logical interpretation, and consistency. Where else but in insurance law would courts feel free to find ambiguities in contract clauses where they do not exist in order to resolve them in favor of the insured;[1] and when that route to victory seems too improbable, simply strike clauses from the contract in favor of the "reasonable expectations" of an insured who never read the contract in the first place?[2]

My favorite case, however, is one in which the court set for itself a double goal – coverage under a single policy for one insured and denial of coverage for another. Impediments to the twin goal lay in the form of exclusions from coverage and conflicting definitions of the forfeiture of an attorney's fee that

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[1] Consider, for example, the case of *Vargas v. Insurance Co. of North America*, 651 F.2d 838 (2d Cir. 1981). An aviation insurance policy limited coverage to "occurrences, accidents, or losses which happen . . . within the United States of America, its territories or possessions, Canada or Mexico." *Id.* at 839. The plane crashed into the sea twenty-five miles west of Puerto Rico while the owner was flying between New York and Puerto Rico, having refueled in Haiti. *Id.* The issue the court dealt with was whether or not the word, "within," was ambiguous. *Id.* Did it actually mean within the borders of the United States, its territories or possessions, or did it include any airspace that one must cross in flying between the United States and its territories or possessions? *Id.* The court found the word, "within," to be ambiguous and interpreted it broadly in favor of the insured. *Id.* at 839-40. I suggest that there is nothing ambiguous about "within." A point is either within or without a given boundary. I suggest that the court "found" a non-existing ambiguity in order to satisfy what seemed to be the reasonable expectations of the insured without resorting directly to that doctrine.

[2] *See, e.g.*, Corgatelli v. Globe Life & Accident Ins. Co., 533 P.2d 737 (Idaho 1975). An accident policy sold to a rodeo bull-rider provided for double the payment for a simple fracture in the event of "Metallic Fixation at Point of Fracture." *Id.* at 739. The insured suffered a shoulder separation, which was treated with a metallic fixation. *Id.* The insured did not suffer a fracture. *Id.* at 742. The court, nevertheless, held for the insured in granting a double recovery. *Id.* at 741. The court did so under the doctrine of reasonable expectations, which required no finding of ambiguity. *Id.* at 741-42. An interesting question might be whether the "reasonable expectation" of double recovery without a fracture was really that of the insured or that of his attorney in scanning the policy after the accident. If the latter, one might ask if that was how the doctrine of reasonable expectations was intended to apply. It may be more than coincidence that six years later, in the case of *Foremost Insurance. Co. v. Putzier*, 627 P.2d 317 (Idaho 1981), the Idaho court abandoned the doctrine of reasonable expectations, adopting the position of the dissenting justice in *Corgatelli.*

required pulling in two opposite directions at the same time. The opinion is something of a work of art, calling to mind the broken field running of Walter Payton or Randall Cunningham.

The case is *Perl v. St. Paul Fire & Marine Insurance Co.*,[3] and the facts are these. Rice had a cause of action based on her use of the now-notorious Dalkon Shield intrauterine device.[4] She retained the services of the law firm of DeParq, Anderson, Perl, Hunegs & Rudquist, P.A., particularly naming partner Norman Perl, to represent her. Perl negotiated a $50,000 settlement with the adjuster for the defendant's insurer. Rice later discovered that the adjuster was at that time also in the employ of Perl's law firm to do investigative work on other cases.[5]

Rice brought an action against both Perl and his law firm, claiming various causes of action such as: fraud, negligence, misrepresentation, breach of contract, civil conspiracy, violation of consumer protection statutes, and breach of fiduciary duty. On the defendants' motion for summary judgment, the only theory that stuck was breach of fiduciary duty, because Rice could not prove actual damages. The net result was that Perl and, vicariously, his firm were found to have violated the absolute fiduciary duty of an attorney to disclose to a client any fact that might result in a conflict of interest, such as the relationship of the firm with the adjuster.[6] The trial court ordered a full refund to Rice of the $20,000 attorney's fee.[7] The Minnesota Supreme Court affirmed this decision.[8]

The action that produced the opinion was a subsequent declaratory judgment action by Perl and the law firm against their own malpractice insurer to determine whether or not the policy should cover the $20,000 fee refund. A touchdown for the Minnesota Supreme Court would be a finding that the single malpractice insurance policy provided coverage for the law firm, but did not provide coverage for attorney Perl. Consider the court's artful dodging of tacklers between it and the goalposts.

The first issue was whether or not the fee forfeiture qualified as "money damages" within the policy, which provided that the insurer would "pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as money damages (other than exemplary or punitive damages) . . . ."[9] The insurer took the position that the forfeiture could not be classified as "damages" since the plaintiff had suffered no actual or provable loss because of the breach of fiduciary duty.

Because the insurer needed to classify the forfeiture in some category, the insurer chose to call it restitution. The insureds argued that it was "damages" because that was what the trial judge called it. The insureds also claimed that

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[3] 345 N.W.2d 209 (Minn. 1984).

[4] *Id.* at 211.

[5] *Id.*

[6] *Id.* at 216.

[7] Rice v. Perl, 320 N.W.2d 407 (Minn. 1982).

[8] *Perl*, 345 N.W.2d at 217.

[9] *Id.* at 211.

"fee forfeiture is really the measure of damages for a breach of fiduciary duty where no actual damages need be proven."[10]

The court chose a path of its own. Clearly, with the court's goal in mind, the holding had to be that the forfeiture was "damages." Otherwise, the policy would not cover the law firm – goal one. How to get there is the rub.

To step back and play with disinterested logic for a moment, there are really three possible classifications for the forfeiture: unjust enrichment to the attorneys, damages to the client, or a punitive award to punish the attorneys. Taking these possibilities one at a time, surely the whole $20,000 fee was not unjust enrichment since the attorney presumably performed whatever services were necessary to acquire a $50,000 settlement, of which the court did not question the legitimacy.[11] Perl, at the least, earned a good portion of the fee. Therefore the fee could not be $20,000 of unjust enrichment. Secondly, there were no actual damages proven, and therefore, there is no real basis for choosing that category. That brings us to the third and most likely classification. The fee forfeiture, in the absence of any actual damages, without torturing logic, was punitive and was intended to make the attorney sting for violating a fundamental fiduciary duty.

The court, however, begins by agreeing with *McCormick on Damages* that, if a defendant's conduct results in no loss to the plaintiff, no legal right has been violated.[12] On the other hand, it finds that there are "absolute rights" that require a defendant to refrain from conduct even if no loss will result.[13] Violation of an "absolute right" will result in "nominal" damages.[14] The fiduciary duty of a lawyer to a client raises one of these absolute rights. Based on that position, the court takes a leap of logic over a gap the size of the Grand Canyon, saying that in this case, rather than nominal damages, fee restoration shall be provided for the client, and that it shall be called "money damages" within that policy term.[15] Oh very well.

The next obstacle was the parenthetical phrase in the coverage clause, "other than exemplary or punitive damages."[16] Here the court must straddle. It is difficult to avoid admitting, as the court says, that the forfeiture "has the effect of *punishing* the attorney for the breach of fiduciary duty and *deterring* future lapses in professional conduct."[17] In its opinion affirming the forfeiture, the court recognized that "the law has traditionally been unyielding in its assessment of *penalties*" for breaches of an attorney's fiduciary duties.[18] To classify the forfeiture as punitive, however, would prevent allowing coverage for the law firm. The court, therefore, splits the difference. At this point in the opinion, the court holds that there are elements of both punishment and compensation.[19] This provides an easy bridge to the trustiest weapon courts have

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10 *Id.*
11 *Id.* at 214 n.4.
12 *Id.* at 212 (citing C. McCormick, McCormick on Damages 86 (1935)).
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.* at 214.
17 *Id.* at 214 (emphasis added).
18 *Id.* (emphasis added).
19 *Id.* (citing Rice v. Pearl, 320 N.W.2d 407, 411 (Minn. 1982)).

employed in tilting the playing field in favor of insureds – the doctrine of ambiguity. "This ambiguity must be construed against the insurer which drafted the language."[20] Coverage, therefore, is back on safe, if not solid "compensatory" ground.

Now the crunch. Having weaved its way to a finding of coverage, how does the court manage to split the two insureds, so that the firm remains covered while the attorney is hung out to dry. Again, that flexible "punitive" issue lends itself to the cause – this time with a public policy twist. Here the court does a bit of a cutback. It starts by reining in the emphasis on the compensatory damage nature of the forfeiture. "[I]t must be kept in mind that we are not talking about insurance coverage for actual, compensatory damages to a client flowing from an attorney's constructive fraud or breach of a fiduciary duty."[21]

That sets the court up to deal with the issue of whether or not public policy should raise its indignant head to prevent insurance coverage from taking the punitive sting out of a judgment of fee forfeiture. The court quotes from a decision involving punitive damages in a workers' compensation case – "we are satisfied that in most instances public policy should prohibit a person from insuring himself against misconduct of a character serious enough to warrant punitive damages."[22]

Perl is left to swing in the breeze. Public policy denies him coverage. The problem for the court then is simply, in light of the court's strong public policy stand and the court's recognition that Perl "honestly believed he could, and attempted to, negotiate a settlement of plaintiff's claim with defendant Browne [the adjuster] at arm's length and with no concern other than the best interests of plaintiff,"[23] how does the court manage to separate the law firm, which assumedly benefited from the $20,000 fee earned by one of its partners, from the same taint of breach of fiduciary duty?

Here the court draws a nice distinction. Since the law firm is vicariously liable, public policy does not apply with the same force as against Perl.[24] The court made this determination, although the firm is clearly tainted by and receives benefit of the fee earned in the course of Perl's breach of fiduciary duty.

To nail the door shut on its accomplishment of granting coverage to the firm and denying it to Perl, the court drops a suggestion to the insurer, lest it should miss the point and undo the court's work. Notice that since Rice can only be repaid the $20,000 once, if the insurer is required to pay it on behalf of the firm, Perl would seem to be off the hook. The court, however, ensured a different result. The court carefully instructs the insurer that once it has paid the $20,000 on behalf of the firm, it would do well to remember that it is

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[20] *Id.*

[21] *Id.* at 215.

[22] *Id.* at 216 (citing Wojciak v. Northern Package Corp., 310 N.W.2d 675, 680 (Minn. 1981)).

[23] *Id.* at 214 n.4. In footnote 5, the court states, "[w]e affirmed the trial court's forfeiture of the entire attorney fee even in the absence of any showing that the attorney's breach was in bad faith or affected the services rendered the client . . . ." *Id.*

[24] *Id.*

subrogated to the claim of the firm against Perl for that same $20,000.[25] In this way, the court's wish comes true. The final $20,000 repaid to Rice comes out of Perl's pocket, and the firm and the insurer break even.

Just to recap the action, by my count, in reaching its goal, the court accomplishes four cutbacks in one opinion on the issue of whether or not the forfeiture is punitive:

FIRST, the forfeiture *is not* punitive, so as to qualify as "money damages" under the coverage clause;

SECOND, the forfeiture *is* punitive to allow Rice to recover without proof of actual damages;

THIRD, the forfeiture *is not* punitive to avoid the exclusion, "other than exemplary or punitive damages";

FOURTH, the forfeiture *is* punitive to apply the public policy ruling against Perl; and

FIFTH, the forfeiture *is not* so punitive as to prevent coverage of the law firm under public policy.

This is a feat of zigging and zagging reminiscent of Walter Payton in his prime.

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25 *Id.* at 217.