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even further limited in the exercise of its discretionary powers with regard to settlement negotiations. It is conceded that this decision will prove favorable in further discouraging the small minority of unscrupulous or heedless insurance companies from selfishly ignoring the interests of their policyholders. But it will also place an additional contractual duty upon the shoulders of *all* automobile insurance companies, a duty nowhere indicated, either expressly or impliedly, in the written policy.

John J. Patridge

CONTRACTS: RECOVERY ON A CONTINGENT FEE CONTRACT BY AN ATTORNEY IN DEFAULT

There is considerable confusion in the law concerning recovery by one who breaches a contract for his personal services. This problem, complicated by the question of divisibility of a contingent fee contract, was raised in the California case of *Moore v. Fellner*.[1]

Moore was employed on a contingent fee basis to prosecute an action by Fellner against one Steinbaum for damages arising from breach of contract. For the same fee he was to defend Fellner in an action brought against him by one Berzon for a broker's commission arising out of the same transaction. Moore's compensation was to have been twenty percent of any amount recovered from Steinbaum if settled before trial or twenty-five percent if the action should proceed to trial, plus costs. The final paragraph of their contract read as follows: "It is understood that this agreement covers our understanding to the conclusion of these two cases in the Superior Court and, at our option, in any of the higher courts." The two actions were consolidated for trial and resulted in a judgment of $104,500 for Fellner against Steinbaum and a judgment of $20,000 against Fellner for Berzon which was settled for $17,500. Steinbaum filed notice of appeal.[2]

Having done all the necessary work to that time in connection with the appeal, but before the appeal was taken, Moore wrote Fellner offering to defend him in the higher court for a fee of $2,000 plus costs. Fellner's answer referred to the terms of the contract by which Moore was required "at our [Fellner's] option" to defend an appeal. Moore repeated his offer demanding the additional fee for his further services. Fellner discharged him and sought new counsel. Moore refused to sign the substitution of attorney papers and Fellner was forced to secure the substitution by order of the court. Upon receipt of notice of the order, Moore wrote that, since Fellner had by this action prevented him from performing his part of "any agreement that we had regarding your representation in that case," he was rescinding the contract and would commence action to determine the reasonable value of services rendered to that date.

The trial court found that Moore's demand for additional fees constituted a breach of contract and that Moore was discharged for cause by Fellner. It also found that Moore had rescinded his agreement with Fellner. That at the time of his discharge Moore had "substantially performed" his agreement, and that the services rendered by him were of value to Fellner. Inconsistencies in the

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[1] 50 Cal.2d ....., 325 P.2d 857 (1958).

[2] Fellner v. Steinbaum, 132 Cal. App. 2d 509, 282 P.2d 584 (1955).

trial court's findings make it difficult to determine with certainty the basis upon which recovery was allowed. The court seems to have relied on rescission and restitution in awarding Moore reasonable value for his services.

From a judgment for $12,825 in Moore's favor, both plaintiff and defendant appealed. Plaintiff contended that the award was inadequate. Defendant, claiming breach of contract by plaintiff, urged that judgment should have been in his favor.

The Supreme Court of California held that the contract had been breached by Moore's unjustified demand for additional fees. That the words "and, at our option, in any of the higher courts" inserted into the contract by the client were intended to reserve to him the right to dismiss the attorneys and obtain other counsel on any appeal. Thus the contract was divisible into services contemplated in the superior court and services contemplated in any of the higher courts. Since the contract was divisible, the court held that the attorney could recover the value of the benefit he conferred upon Fellner less any damages caused by his breach. The value of the services actually rendered was based on the contract price and damages were the cost to Fellner of obtaining other representation in the appeal.

There are three distinct approaches applicable in deciding whether a plaintiff in default should recover.

Under the traditional theory a breaching party on an entire contract for personal services will be denied recovery.[3] In order to allow recovery, the court must find the contract of employment divisible. Even then recovery is limited to those divisible parts of the contract *fully* performed at the time of the breach.[4]

The second approach will deny recovery where the breach is intentional, deliberate or wilful.[5] The difficulty here is in determining what constitutes such a breach.[6] An intentional, deliberate or wilful breach entitling the other party to a discharge of his obligation under the contract is accomplished by an act which is in fact inconsistent with an intent to be further bound by the terms of the contract.[7] It is to be distinguished from an act done inadvertantly or under a mistaken notion as to the actor's rights under the contract.[8]

The third approach is based on the rule in *Britton v. Turner*.[9] This case represents the strong minority position that, regardless of the defaulting party's conduct, he is entitled to the reasonable value of the benefit conferred upon the other party less any damage caused by his default.[10]

[3] Cahill v. Baird, 7 Cal. Unrep. 61, 70 Pac. 1061 (1902); 4 WILLISTON, CONTRACTS § 1028, 5 *Id.* § 1477 (rev. ed. 1938).

[4] Hartman v. Rogers, 69 Cal. 643, 11 Pac. 581 (1886).

[5] WILLISTON, CONTRACTS § 1473 (rev. ed. 1938); RESTATEMENT, CONTRACTS § 357 (1) (a), comment 1*e* (1932); RESTATEMENT, AGENCY §456 (b), comment *c* (1933).

[6] CORBIN, CONTRACTS § 1123 (1950).

[7] Worthington v. Given, 119 Ala. 44, 24 So. 739 (1898).

[8] This seems to have been the position of the District Court of Appeals in reversing the trial court and finding for the defendant, Fellner. The court found that Moore had by his conduct discharged himself under the contract, that Fellner's notice of discharge was a mere formality, and that Moore's notice of rescission was ineffective for any purpose. Presiding Justice Shinn, writing the opinion of the court, said:

"This is not merely a case where an attorney has been discharged for cause, . . . It is a simple case of breach of contract by the attorney."

Moore v. Fellner, 155 A.C.A. 742, 318 P.2d 526 (1957).

[9] 6 N.H. 481 (1834).

[10] 5 CORBIN, CONTRACTS § 1127, at 565 and cases cited n. 36 (1951).

In the *Moore* case the Supreme Court stated *obiter* that an attorney who wrongfully abandons or withdraws from a case or is discharged for cause by the client may not recover compensation where the contract of employment is entire,[11] aligning California with the traditional view. However, the court found the contract *divisible* and allowed Moore to recover the reasonable value of the benefit conferred on his client. This finding of divisibility of a contingent fee contract is highly questionable.

An entire contract does not by its terms, express or implied, contemplate or admit of apportionment upon partial failure.[12] A contract in which all parts are intended to be interdependent is entire.[13] To find a contract divisible it is essential not only that a part be calculable, but that there be an express or implied promise to pay for that part.[14] Tested by these statements a contingent fee contract is clearly an entire contract.

Further, recovery based on reasonable value is inconsistent with a finding of divisibility. Under a truly divisible contract a defaulting plaintiff need only show performance of the divisible portion in order to recover. In such a case recovery can be had *on the contract* for any fully performed divisible part with no necessity for proving reasonable value or benefit to the defendant.[15] Indeed, an attorney may not arbitrarily renounce a contract and claim instead the reasonable value of his services.[16] Even a contract contemplating alternate percentages of the recovery depending upon the settlement of a matter without going to court, settlement after trial, or settlement after appeals is not divisible. A favorable judgment in a trial court which is ultimately reversed on appeal will not earn the attorney any fee for his services in the trial court. Nor will success in the trial court followed by successful defense of an appeal earn two fees.[17] Such a contract should be construed as being three separate entire contracts based on alternate contingencies, the operation of one necessarily precluding the other two.

The Supreme Court held in the *Moore* case that the words "and, at our option, in any of the higher courts" inserted into the contract by the client created a contract divisible for the benefit of the client in reserving to him the right to change counsel on an appeal. It then reasoned that a contract divisible for the benefit of one party is also divisible for the benefit of the other party. However, since a client has the right to change counsel at any time,[18] it seems at least as reasonable to construe the words as intended to protect the client by assuring him the services of counsel in case he should wish to carry an appeal from an

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[11] Cahill v. Baird, 7 Cal. Unrep. 61, 70 Pac. 1061 (1902), *rev'd on other grounds*, 138 Cal. 691, 72 Pac. 342 (1903); 7 C.J.S. *Attorney and Client* § 169(a)(3) (1952); WOOD, FEE CONTRACTS OF LAWYERS §§ 68, 70 (1936). See *In re* Badger, 9 F.2d 560 (2d Cir. 1925). *Accord*, RESTATEMENT, CONTRACTS § 270 (1932); RESTATEMENT, AGENCY §§ 445, 456, 469 (1933). *But see* Salopek v. Shoemann, 20 Cal. App. 2d 150, 124 P.2d 21 (1942).

[12] Brockett v. Pipkin, 25 Tenn. App. 1, 149 S.W.2d 478 (1941).

[13] Palmer v. Fix, 104 Cal. App. 562, 286 Pac. 498 (1930).

[14] 3 WILLISTON, CONTRACTS § 861 (rev. ed. 1938).

[15] 5 CORBIN, CONTRACTS § 1127, at 570 (1950); see also 4 WILLISTON, CONTRACTS § 1028, at 2868 (rev. ed. 1938).

[16] 6 CAL. JUR. 2d *Attorneys at Law* § 188 (1952).

[17] Jackson v. Campbell, 215 Cal. 103, 8 P.2d 845 (1932).

[18] 6 CAL. JUR. 2d *Attorneys at Law* § 172 (1952).