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Indiana's Allowance of Punitive Damages in Contract Actions Against Insurance Companies: How New Is It?

Indiana courts have recently awarded punitive damages in contract actions even though the breaching party's wrongful conduct does not fit the definition of a traditionally recognized tort. Vernon Fire & Casualty Insurance Co. v. Sharp involved an action by an insured against an insurer for failure to pay or attempt to settle a claim. The Indiana Supreme Court held that punitive damages may be assessed in contract actions when it appears that the public interest will be served by the deterrent effect such awards have upon future conduct of similarly situated parties. Since Vernon eliminated the traditional requirement of an independent tort, commentators perceive it as a significant modification of the law, and insurance companies perceive the allowance of punitive damages against them as a costly decision.

An examination of the policies underlying both the law of punitive damages and the doctrine of duress will reveal that the Vernon rule, when applied to contract cases where an insurance

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2 264 Ind. 599, 349 N.E.2d 173 (1976). Vernon has the distinction of being one of the first cases to unequivocally declare that punitive damages may be awarded in the absence of an independent tort. See Note, The Expanding Availability of Punitive Damages in Contract Actions, 8 IND. L. REV. 668, 681 (1975).

3 264 Ind. at 608, 349 N.E.2d at 180.

4 Davis, Punitive Damages for Contract Breach, 21 RES GESTAE 306 (1977); Note, supra note 2; J. Young, Guest Speaker at Indianapolis Bar Association Seminar, Recovering Punitive Damages 10 (July 13, 1978)(unpublished manuscript in Indiana University School of Law Library); cf. Sullivan, Punitive Damages in the Law of Contract: The Reality and Illusion of Legal Change, 61 MINN. L. REV. 207, 247 n.198 (1977) (concluding that "it is too early to speculate—as some commentators have—that decisions like Vernon, which appear to liberalize the availability of punitive damages for breach of contract, constitute the irresistible wave of the future").

company has intentionally failed to pay or make an attempt to settle a claim, represents no change in the law. This note will demonstrate that existing case law recognizes and protects a special public interest in preventing oppressive breaches of certain private contracts where a service needed by the majority of the public is at stake. Since the insurance agreement falls into this category of contractual relationships deserving special attention, Indiana's treatment of insurance cases is nothing more than a straightforward recognition of a public policy already firmly entrenched in the common law.

THE TRADITIONAL RULE

In cases growing out of the nonperformance of contracts, compensatory damages, intended solely to repay the plaintiff's pecuniary loss, are the traditionally accepted measure of relief. The general rule, recognized throughout the United States, is that punitive awards are not recoverable for a breach of contract in the absence of an independent tort by the breaching party.

The reason for the separate tort requirement can be understood in light of the purpose of punitive damages, which is to protect and vindicate the interests of society as a whole by punishing the

* Although, as in Vernon, punitive damages are commonly sought in insurance cases, see, e.g., State Farm Mut. Auto. Ins. Co. v. Shuman, ___ Ind. App.____, 370 N.E.2d 941 (1977); Sexton v. Meridian Mut. Ins. Co., 166 Ind. App. 529, 337 N.E.2d 527 (1975); Rex Ins. Co. v. Baldwin, 163 Ind. App. 308, 323 N.E.2d 270 (1975), Indiana courts also have applied the Vernon rule to contract actions brought by consumers against sellers, see, e.g., Hibschman Pontiac, Inc. v. Batchelor, ___ Ind. App.____, 362 N.E.2d 845 (1977) (breach of warranty on automobile); Jones v. Abriani, ___ Ind. App.____, 350 N.E.2d 635 (1976) (breach of warranty on mobile home). It is the special nature of the insurance-contract relationship, however, which, in the context of an allowance of punitive damages for an oppressive breach of contract, deserves closer examination and which is to be the focus of this note:

The purpose and nature of life insurance contracts, and the duties which the insurer assumes under such contracts, and the manner in which such contracts are negotiated, impress such contracts and the relationship of the parties, even during the negotiations, with characteristics unlike those incident to contracts and negotiations for contracts in ordinary commercial transactions.


7 J. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 30 (9th ed. 1920); 11 S. WILLISTON, supra note 1, § 1388, at 197.

wrongdoer and by deterring others from imitating him.\(^9\) Accordingly, only those wrongs intentionally committed in violation of a duty owed to the public in general, as opposed to a duty owed to a private party, are appropriate subjects for punitive treatment. Torts logically fall into this category\(^10\) since the duties of conduct which give rise to them are imposed by law and are based primarily upon public policy, not the will or intention of the parties.\(^11\) By contrast, contractual obligations are imposed because the conduct of the parties manifests their intent to be bound; the duties are owed solely to the specific individuals named in the contract, rather than to society as a whole.\(^12\) Thus, in the absence of an independent tort, contract breaches have traditionally been remedied by compensatory damages only.\(^13\)

**Traditional Exceptions: Breach of Promise to Marry and Breach by a Public Service Company**

There is a group of cases, however, where punitive damages are awarded even though there is no showing of an independent tort. Both the breach of promise to marry\(^14\) and the deliberate breach of a contract for services by a public utility company\(^15\) fall into this category of traditional exceptions because they contain distinct characteristics which make them appropriate for punitive damage treatment. The misconduct consists of a contract breach where the

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\(^10\) 5 A. Corbin, supra note 8, § 1077, at 438-39.

\(^11\) Id.; W. Prosser, supra note 9, § 92, at 613.

\(^12\) W. Prosser, supra note 9, § 92, at 613. "[They] do not in general cause as much resentment or other mental and physical discomfort as do wrongs called torts and crimes." 5 A. Corbin, supra note 9, § 1077, at 438.

\(^13\) 5 A. Corbin, supra note 8, § 1077, at 438.

\(^14\) C. McCormick, Handbook on Law of Damages § 81, at 291 (1935); 11 S. Williston, supra note 1, at 211-12. Writes Williston:

> [I]n many jurisdictions, exemplary damages are allowed in certain cases. Generally, it is only in actions of tort that they are permitted, but in actions for breach of promise to marry they are allowed if the defendant's conduct was wanton and such as to show a total disregard of the plaintiff's feelings.

*Id.* (footnotes omitted). See, e.g., Jacoby v. Stark, 205 Ill. 34, 68 N.E. 557 (1903); Kurtz v. Frank, 76 Ind. 694 (1881); Collidge v. Neat, 129 Mass. 146 (1880); Vanderpool v. Richardson, 52 Mich. 336, 17 N.W. 936 (1883); Drobnich v. Bach, 159 Minn. 258, 198 N.W. 669 (1924); Chellis v. Chapman, 125 N.Y. 214, 26 N.E. 308 (1891); Thorn v. Tetrick, 93 W. Va. 455, 116 S.E. 762 (1923).

\(^15\) C. McCormick, supra note 14, § 81, at 289-90; 11 S. Williston, supra note 1, § 1340, at 213.
defendant takes advantage of a vulnerable promisee in an oppressive manner. The promisee's vulnerability must exist because of the essential nature of the services and the uniqueness of the relationship, and the resulting harm must be longlasting and more than merely pecuniary.

_Breach of Promise to Marry_

The courts justify the allowance of punitive damages in breach of promise to marry situations by pointing out that, although the conduct does not actually constitute an independent tort, the injury caused has much in common with a tort. Thus, while the independent tort is not present, something more than a contract breach is. That society has an interest in protecting its citizens from similar harm, regardless of the absence of an independent tort, is justification for the imposition of punitive damages.

Certain factors in the marriage cases provide strong policy reasons for awarding punitive damages. Although each factor alone might not be enough to justify exemplary awards, their combination results in conduct and harm which society has an interest in preventing. One of the most obvious elements in this aggregate is the nature of the services promised. A marital relationship fulfills basic needs—the need for companionship, love and security—which are common to most human beings. The fulfillment of these needs is essential to an individual's health and indirectly to a society's well-being. Additionally, because the relationship takes much time to develop and because of its inherent complexity, it is unique. If it is abruptly discontinued the injured party has no one to turn to for immediate fulfillment of these basic needs. If the contractual relationship contains both uniqueness and a promise to perform services of the utmost importance to an individual's well-being, dependency will result. To intentionally breach such a contract for the purpose of taking advantage of the other's vulnerability so as to inflict harm which is longlasting and more than pecuni-

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17 "In such cases, just as in the cases of tort in general, the community resentment is greater and its satisfaction may require punishment as well as compensation." 5 A. Corbin, _supra_ note 8, § 1077, at 440.

18 For a general discussion on this subject, see R. Klem, _Marriage and Family Relationships_ (1970); L. Saxton, _The Individual, Marriage, and the Family_ (2d ed. 1972); N. Stinnett & J. Walters, _Relationships in Marriage and Family_ (1977).
PUNITIVE DAMAGES

ary in nature has been called "cruel" by Professor Arthur Corbin and said to "sound in tort" by the courts. The breach often results in additional expenses, hardship and a certain amount of mental suffering, such as depression, anxiety or humiliation, all of which have little in common with the damages inflicted by the breach of a commercial bargain. Such misconduct and resulting harm falls somewhere in the gray area between contractual breach and tort. Nevertheless, in making an award of punitive damages in these cases, the courts recognize that society has an interest in protecting its citizens from similar harm in the future.

**Breach by a Public Service Company**

The other exception to the rule has appeared in many jurisdictions; it involves actions against public service companies for wrongful failure to supply services. Again the misconduct falls somewhere between breach of contract and tort. As in the marriage cases, there is a contract breach, plus conduct and harm which the public has an interest in preventing. The essential nature of the services is an important factor. Courts explain that public service

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19 A broken engagement alone will not justify punitive damages. There must also be a showing that the misconduct was wanton and such as to show a total disregard of the plaintiff's feelings. 11 S. Williston, supra note 1, § 1340, at 211-12.

20 See generally cases cited note 16 supra. Such language is the same as, or strikingly similar to, that used in the recent insurance cases awarding punitive damages, which hold that the misconduct must be "tortious," "oppressive" or "lacking in good faith." That the misconduct be oppressive or lacking in good faith was required in Sexton v. Meridian Mut. Ins. Co., 166 Ind. App. 529, 533, 337 N.E.2d 527, 529 (1975), and Rex Ins. Co. v. Baldwin, 163 Ind. App. 308, 313-14, 323 N.E.2d 270, 274 (1975). That the misconduct be "tortious in nature" was required in Vernon Fire & Cas. Ins. Co. v. Sharp, 264 Ind. 599, 608, 349 N.E.2d 173, 180 (1976).

21 5 A. Corbin, supra note 8, § 1077, at 440. See generally cases cited note 16 supra. Such language is the same as, or strikingly similar to, that used in the recent insurance cases awarding punitive damages, which hold that the misconduct must be "tortious," "oppressive" or "lacking in good faith." That the misconduct be oppressive or lacking in good faith was required in Sexton v. Meridian Mut. Ins. Co., 166 Ind. App. 529, 533, 337 N.E.2d 527, 529 (1975), and Rex Ins. Co. v. Baldwin, 163 Ind. App. 308, 313-14, 323 N.E.2d 270, 274 (1975). That the misconduct be "tortious in nature" was required in Vernon Fire & Cas. Ins. Co. v. Sharp, 264 Ind. 599, 608, 349 N.E.2d 173, 180 (1976).

22 5 A. Corbin, supra note 8, § 1077, at 441; C. McCormick, supra note 14, § 111, at 398.

23 5 A. Corbin, supra note 8, § 1077, at 442. It is no wonder the injuries have been classified as those similar to harms commonly labeled as torts.

24 C. McCormick, supra note 14, § 81, at 289-90; 11 S. Williston, supra note 1, § 1340, at 213.

25 See, e.g., Lane v. Cotton, 88 Eng. Rep. 1458 (1701), a case involving liability of a postmaster general for property which was lost in the mail, in which Chief Justice Holt said: If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of this trade.
Company breaches are treated as exceptions to the general rule because they provide services or commodities, such as water,\textsuperscript{26} telephone service,\textsuperscript{27} electricity and heat,\textsuperscript{28} transportation,\textsuperscript{29} and other public services\textsuperscript{30} which fulfill basic needs of most individuals: "The telephone may be considered a necessary household utility, so much so that the thought of losing it will coerce almost any one into payment of any debt claimed within reason rather than have it cut out."\textsuperscript{31} Moreover, as in the marriage cases, there is a unique relationship since there is no one else to turn to for immediate relief if a public service company breaches.\textsuperscript{32} These factors in the relationship again coalesce, placing the promisee in a vulnerable position. The courts guard against a monopoly taking advantage of its customers’ dependency by ruthlessly cutting them off from services so as to inflict more than regular contract damages, by allowing exemplary awards in the public service cases.\textsuperscript{33} They do so because the resulting harm is more than the loss of a commercial bargain: To use the words of Justice De Graffenried in \textit{Birmingham Water Works Co. v. Keiley}:\textsuperscript{34} "The water service which was denied by appellant to appellee was of importance to him, and its denial, according to his testimony, put him and his family to in-

\textsuperscript{26} \textit{Birmingham Water Works Co. v. Keiley}, 2 Ala. App. 629, 56 So. 838 (1911).
\textsuperscript{27} \textit{Cumberland Tel. & Tel. Co. v. Hobart}, 89 Miss. 252, 42 So. 349 (1906).
\textsuperscript{29} \textit{Jeffersonville R.R. v. Rogers}, 38 Ind. 116 (1871).
\textsuperscript{30} \textit{E.g., Woody v. Nat'l Bank}, 194 N.C. 549, 140 S.E. 150 (1927) (bank checking account).
\textsuperscript{31} \textit{Cumberland Tel. & Tel. Co. v. Hobart}, 89 Miss. 252, 263, 42 So. 349, 351 (1906). \textit{See also} \textit{Shepard v. Milwaukee Gas Light Co.}, 6 Wis. 526, 533 (1858). Interestingly, the \textit{Cumberland} quote could be applied to a duress case. In \textit{Cumberland}, where plaintiff customer did not pay an amount due under a separate contract for a telephone in a different building for which his wife only was liable, the telephone company cut off plaintiff's telephone service. \textit{See notes 73-84 & accompanying text infra}, for an analysis of the doctrine of duress.
\textsuperscript{32} Certain commentators and courts refer to this as a "monopolistic position." \textit{See 5 A. Corbin, supra note 8, § 1077}, at 444; \textit{Sullivan, supra note 4}, at 224; \textit{Wyman, The Law of the Public Callings as a Solution of the Trust Problem (pt. II)}, 17 HAB. L. Rev. 217 (1904); \textit{Note, supra note 2, at 678}. As explained by the court in \textit{Cumberland Tel. & Tel. Co. v. Hobart}, 89 Miss. 252, 42 So. 349 (1906):

\begin{quotation}
It is a public service corporation without competition, monopolistic in nature, and the patrons have no choice but to accept its service, and they have not the privilege of selecting to do business with a competitor because there is no competitor, and for this reason the rights of the public should be carefully guarded against oppressive methods . . . .
\end{quotation}

\textit{Id.} at 263, 42 So. at 351.
\textsuperscript{33} "Legal rules governing the common callings were shaped by the need to protect the public against exploitation or oppression by the providers of important services." \textit{Sullivan, supra note 4}, at 224.
\textsuperscript{34} 2 Ala. App. 629, 56 So. 838 (1911).
convenience, hardship, and expense." The action, like the marriage cases, is said to "sound in tort."

Thus, punitive damages are awarded when the promisor uses its leverage—acquired because of the essential nature of the services and the uniqueness of the relationship—in an oppressive manner to cause harm which consists of more than immediate monetary damages. Such behavior is contrary to the public interest and punitive damages are justified as a means of discouraging parties in the future from engaging in similar misconduct.

THE Vernon Rule: A FALSE IMPRESSION OF CHANGE

In Indiana, the courts continued for many years to require the showing of an independent tort before awarding punitive damages outside the realm of the marriage and public service company cases. However, Vernon Fire & Casualty Insurance Co. v. Sharp held that an independent tort need not always be found before an award of punitive damages. The Indiana Supreme Court explained that exemplary relief will be allowed in contract cases if the conduct is "tortious in nature" and if it appears "that

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36 Id. at 639, 56 So. at 841. See also Cumberland Tel. & Tel. Co. v. Hobart, 89 Miss. 252, 263, 42 So. 349, 351 (1906).
38 See, e.g., Physicians Mut. Ins. Co. v. Savage, 156 Ind. App. 283, 296 N.E.2d 165 (1973); Standard Land Corp. v. Bogardus, 154 Ind. App. 283, 289 N.E.2d 803 (1972); Capitol Dodge, Inc. v. Haley, 154 Ind. App. 1, 288 N.E.2d 766 (1972); Voekel v. Berry, 139 Ind. App. 267, 218 N.E.2d 924 (1965); Hedworth v. Chapman, 135 Ind. App. 129, 192 N.E.2d 649 (1963). A typical example was Murphy Auto Sales, Inc. v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953), an action by a minor and his mother to recover damages for breach of an automobile sales contract, where the automobile was falsely represented by the defendant to be in good condition at the time of the sale. In addition to holding that there was a breach of contract, an award of punitive damages was affirmed by the court of appeals because there was also a finding of gross fraud. Id. at 717-18, 112 N.E.2d at 592-93. The court was careful to state that, as a general rule, punitive damages were to be awarded only upon the showing of a tort committed independently of the breach of contract. Id. at 717, 112 N.E.2d at 592.

39 In Jerry Alderman Ford Sales, Inc. v. Bailey, 154 Ind. App. 632, 291 N.E.2d 92 (1972), the Second District Court of Appeals indicated that it would be receptive to the idea of eliminating the tort requirement. Note, supra note 2, at 682.
40 In a few other states there was another minor, early exception to the general rule. Some courts intimated that if the condition of a bond given in accordance with statutory mandate was broken, punitive damages would be recoverable. C. McCormick, supra note 14, § 81, at 291; 11 S. Williston, supra note 1, § 1340, at 213-14.
41 264 Ind. 599, 349 N.E.2d 173 (1976). Here, the plaintiff attempted to collect proceeds under a fire insurance policy covering certain property located at his creosoting plant which had been virtually destroyed by fire. The insurers made no attempt to settle the claim.
42 Id. at 608-09, 349 N.E.2d at 180-81.
the public interest will be served by the deterrent effect punitive damages will have upon future conduct of the wrongdoer and parties similarly situated.\textsuperscript{44} Both the court of appeals\textsuperscript{42} and the supreme court\textsuperscript{43} emphasized that the plaintiff repeatedly had informed the insurer that he was in desperate and immediate need of the insurance proceeds to satisfy pressing financial matters caused by the loss of his business in a fire and that the insurer made no offer to settle between the time of the loss and the trial two years later. Such conduct was characterized by the supreme court as "oppressive"\textsuperscript{44} and contrary to the public interest.\textsuperscript{45}

\textit{Vernon}'s approach to an oppressive insurance contract breach recognizes that the type of misconduct present under the traditional exceptions occurred in that case. Insurance has become an essential service for most people.\textsuperscript{46} It is similar in many ways to services provided by public service companies. Proceeds from a policy provide the means to stay warm, to eat, to receive medical assistance, and to continue to subsist when one can no longer work. Moreover, this aid comes at a time when it is most needed—when a spouse has died; when a business is destroyed; when someone is injured in an accident. Insurance is also similar to marriage promises. It fulfills a basic human need; provides security and freedom from fear of being left alone; replaces the income that a deceased or disabled spouse once provided; and helps to replace destroyed or stolen property upon which rests a great deal of emotional dependency.

Adding to the insured's dependency is the fact that he often has nowhere else to turn for immediate relief in the event of a breach by the insurer. Medical and casualty losses lead to expenses which the insured frequently cannot cover with other funds. This dilemma is analogous to that of the abandoned fiance or the person who is cut off from a public utility. In \textit{Vernon}, the insurer made no offer to settle between the time of the loss and the trial two years later.\textsuperscript{47} The "relief" the plaintiff-insured received in the courtroom was certainly not immediate.

The insured's dependency makes him vulnerable to exploitation.

\textsuperscript{41} Id. at 608, 349 N.E.2d at 180 (emphasis omitted).
\textsuperscript{43} 264 Ind. at 610-11, 349 N.E.2d at 181.
\textsuperscript{44} Id. at 615, 349 N.E.2d at 184.
\textsuperscript{45} Id. at 615-16, 349 N.E.2d at 185.
\textsuperscript{46} See generally cases cited notes 60-62 infra.
\textsuperscript{47} Id. at 610-11, 349 N.E.2d at 181.
Since the insurer receives premiums before its obligation arises, it will lose little, compared to the insured, by deferring payment until forced to do so by an adverse judgment. The insured has no real power to influence the insurer's decision not to pay immediately. Insurance companies are aware that people coming to them for proceeds on their policies usually have been through a trying experience, have suffered a loss and are at the company's mercy. In the same way that the promisors in the marriage cases exploited their fiancées' vulnerability by ruthlessly cutting off the engagements, and the public service companies by cutting off their customers' services, the insurer in Vernon intentionally used its leverage to harm the insured in refusing to attempt to settle the claim. 48

The harm that results from such an oppressive contract breach by an insurance company consists of something more than immediate monetary damages. The insured's loss consists not only of regular contract damages, for like the betrayed fiancée and abandoned public utility customer, there is also a loss of security and of peace of mind. More remote expenses are also incurred since relief must be postponed until a court judgment can be obtained. 49

Thus, the overall misconduct, which Vernon called "tortious in nature," 50 amounts to something more than a regular contract breach. Marriage cases note harm similar to those injuries commonly labeled "torts" 51 and public service cases find harms which "sound in tort." 52 This similarity in language and reasoning cannot be ignored, for though this misconduct is not a tort per se, the public has an interest in preventing comparable behavior in the future. Vernon made this public interest a part of the damages test, 53 which indicates a recognition that these cases are not regular

48 In its discussion of the suitability of an award of punitive damages in view of such misconduct, the Vernon court was careful to emphasize however, that the parties must be "permitted to dispute . . . liability in good faith because of the prohibitive social costs of a rule which would make claims nondisputable." Id. at 609-10, 349 N.E.2d at 181.

49 In Vernon, the insurers knew that plaintiff desired to rebuild his business, but could not do so without the insurance proceeds, and that plaintiff continued to incur the expense of a monthly rental of $300 for the plant site in anticipation of rebuilding. Id. at 610, 349 N.E.2d at 181.

50 Id. at 608, 349 N.E.2d at 180.


52 See, e.g., Birmingham Water Works Co. v. Keiley, 2 Ala. App. 629, 639, 56 So. 838, 841 (1911); Cumberland Tel. & Tel. Co. v. Hobart, 89 Miss. 252, 263, 42 So. 341, 351 (1898); Southwestern Gas & Elec. Co. v. Stanley, 45 S.W.2d 671, 674 (Tex. Civ. App. 1931), aff'd, 123 Tex. 157, 70 S.W.2d 413 (1934).

53 264 Ind. at 608, 349 N.E.2d at 180.
contract breaches, but rather lie in the gray area between contract and tort law.

Thus, an award of punitive damages in Vernon does not represent a departure from the traditional cases awarding punitive damages. The significant factors in Vernon are also present in the cases involving the breach of promise to marry and the breach by public service companies: a dependent relationship due to the essential nature of the services contracted for and the uniqueness of the relationship; oppressive behavior on the part of the breaching party as a result of it taking advantage of the special relationship; and harm which is something more than pecuniary and which is longlasting. All of this adds up to misconduct which is "tortious in nature" and which the public has an interest in deterring in the future—the only requisites for an award of punitive damages. The existence of an independent tort is unimportant.

The Rule in California—A Different Approach

Like Indiana, California has awarded extra damages in contract cases where an insurer fails to accept a reasonable settlement or unreasonably and in bad faith withholds benefits owed under a policy. California, however, labels such misconduct a tort per se, notwithstanding that it may also constitute a breach of contract, thus an implied duty of good faith and fair dealing on the part of insurance companies with regard to their performance of insurance contracts is enforced.

Labeling the behavior a tort enables the California courts to avoid an accusation of modifying the traditional punitive damage

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5 A. Corbin, supra note 8, § 1077, at 438; W. Prosser, supra note 9.
rule. Regardless of the label applied, be it an oppressive breach of contract or a breach of an implied duty to act in good faith and to deal fairly, the California courts justify this special treatment of insurance contracts on policy grounds which are analogous to the factors present in the public service and marriage contract cases. The courts explain that the bases for the extra damage awards are "the reasonable expectation of the public and the type of service which the entity holds itself out as ready to offer,"[60] that the special relationship and duties of the insurer exist in recognition of the fact that the insured does not contract
to obtain a commercial advantage but to protect herself against the risks of accidental losses, including the mental distress which might follow from the losses. Among the considerations in purchasing . . . insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss . . . .[61]

California courts also emphasize that the insured's position is further weakened since he will not be able to obtain relief elsewhere if the company refuses to perform:

Plaintiff's application, filed shortly before the accident, indicated that he had no other hospital or disability insurance and, indeed, the manager of defendant's claims department testified that the policy would not have been issued if plaintiff had other hospital insurance. Defendant was aware that plaintiff earned only a modest income and had incurred substantial medical and hospital bills. The company also knew that there was a serious question whether plaintiff would qualify for workmen's compensation benefits, and that the compensation carrier had consistently denied coverage on the ground that plaintiff was not an employee at the time of the accident.[62]

It is this dependent nature of the insurance relationship which justifies the imposition of special duties on insurance companies with respect to their handling of insurance claims,[63] for "the very risks insured against presuppose that if and when a claim is made,

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the insured will be disabled and in strait financial circumstances and, therefore, particularly vulnerable to oppressive tactics on the part of an economically powerful entity.\textsuperscript{64} Therefore, where an insurer fails to accept a reasonable settlement or unreasonably and in bad faith withholds benefits owed under a policy, and does so in an oppressive, fraudulent or malicious manner, thereby taking advantage of the dependent relationship it has entered into with the insured so as to inflict something more than immediate commercial harm upon him,\textsuperscript{65} it will be liable for punitive damages in California.\textsuperscript{66}

This is identical to misconduct Indiana treats as appropriate for punitive damages under the Vernon oppressive-breach rule. Yet in California "[i]t is well settled that punitive damages may not be recovered for a breach of contract, even if the breach is willful, fraudulent or coupled with evil intent."\textsuperscript{67} While the California courts purport to be rejecting the Vernon rule, they do precisely the same thing it does under a different label.\textsuperscript{68}

Regardless of what it is called, be it an exception to the traditional punitive damages rule,\textsuperscript{69} a breach of an implied covenant of good faith and fair dealing,\textsuperscript{70} or a breach, tortious in nature, which does not fit the confines of a predetermined tort,\textsuperscript{71} the misconduct is always the same. Its features should be recognized so that results

\textsuperscript{64} Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 404, 89 Cal. Rptr. 78, 95 (1970).

\textsuperscript{65} Note that in California, the misconduct that will support a punitive damage award will be labeled a "tort" consisting of either intentional infliction of emotional distress or interference with a protected property interest in the insurance proceeds. Id. at 401-02, 89 Cal. Rptr. at 93-94.

\textsuperscript{66} Id. at 402, 89 Cal. Rptr. at 94.

\textsuperscript{67} Id. at 400, 89 Cal. Rptr. at 92.

\textsuperscript{68} It is a California court, however, which has noted that "[t]he label is not important." Barerra v. State Farm Mut. Auto. Ins. Co., 71 Cal. 2d 659, 668, 456 P.2d 674, 681, 79 Cal. Rptr. 106, 113 (1969). In Barerra the court, as in Vernon, emphasized that the insurance business is affected with a public interest in offering services of a quasi-public nature, id. at 669, 456 P.2d at 680-81, 79 Cal. Rptr. at 112-13, and it further noted that "[i]t is not vastly important that the legal relationship be placed in a particular category," id. at 668, 456 P.2d at 681 n.6, 79 Cal. Rptr. at 113 n.6 (emphasis omitted) (quoting Kukuska v. Home Mut. Hail Tornado Ins. Co., 204 Wis. 166, 169, 235 N.W. 403, 405 (1931)), since "[w]hether this duty be called one of tort or of quasi-contract is immaterial," id. n.7 (emphasis omitted) (quoting Funk, The Duty of an Insurer to Act Promptly on Applications, 75 U. Pa. L. Rev. 207, 224 (1927)).

\textsuperscript{69} See notes 14-15 & accompanying text supra.


PUNITIVE DAMAGES will be more consistent and reasoning more logical.  

A CAMOUFLAGED SOURCE OF THE VERNON RULE: THE DOCTRINE OF DURESS

In the doctrine of duress there exists a public policy of preventing misconduct similar to the marriage, public service and insurance cases. Under the Vernon rule, courts may require the defendant to pay more than regular contract damages whenever there is a contract breach plus wrongful conduct which the public has an interest in preventing, even though such conduct does not constitute an independent tort. In the duress cases, rescission is allowable whenever there is a threat of a breach plus wrongful conduct which the public has an interest in preventing, even though the threatened act is not independently wrongful. The only difference between the two types of cases is that in the Vernon situation there is an actual breach while in the duress situation there is only the threat of a breach.

Under the doctrine of duress, if a promisee has an immediate need for the promised goods or services and is unable to obtain them from another source, a threat by a promisor to withhold performance until the promisee gives in to the promisor's unjust demands may be treated as duress justifying rescission of the coerced agreement. Although in the duress situation the promisor does not actually withdraw from the relationship but only threatens to do so, it is still analogous to the Vernon misconduct since the promisee's harm is a direct result of a dependent relationship.

The courts sometimes achieve a similar result by abusing the fraud or conversion test in an attempt to find the elements of an independent tort where there is no real evidence of one. See, e.g., Jerry Alderman Ford Sales, Inc. v. Bailey, 154 Ind. App. 632, 291 N.E.2d 92 (1972), a case arising four years before Vernon where "it is not clear whether the court of appeals' decision was based upon a finding of a technical tort of conversion, some variation of fraud, or simply an oppressive breach of contract." Note, supra note 2, at 682.

Compare Contractor's Safety Ass'n v. California Compensation Ins. Co., 48 Cal. 2d 72, 307 P.2d 626 (1957) with Wetherbee v. United Ins. Co. of America, 265 Cal. App. 2d 921, 71 Cal. Rptr. 764 (1968). Although both cases involved the same fact pattern, the Contractor's court chose to refer to the fraudulent inducement in the case as a "fraudulent breach" while the Wetherbee court in effect found a fraudulent inducement but decided the facts before it presented a "fraud," thereby warranting exemplary damages. Note, Exemplary Damages in Contract Cases, 7 WILLAMETE L.J. 137, 141-43 (1971).

Clarification of the rule would be beneficial to insureds and insurers alike in that it would enable them to predict the results of their relationship.

See generally notes 37-54 & accompanying text supra.


Id. § 9.12, at 314-15.
which the promisor intentionally uses to his advantage to cause harm to the promisee.\textsuperscript{76}

Notably, the courts have emphasized that the services or goods to be withheld are essential by their nature\textsuperscript{77} and that there is a special, immediate and pressing need for them\textsuperscript{78} which increases the dependent nature of the relationship. Moreover, as in Vernon, whether the promisee has a reasonable alternative which could produce prompt and adequate relief in the event of a breach is an important factor in determining whether the promisee is in a vulnerable position.\textsuperscript{79}

Once the promisor exerts leverage, acquired because of the dependent nature of the relationship, so as to cause harm to the promisee, he has coerced the promisee in such a way as to constitute duress justifying rescission of the oppressive settlement or recovery of the excessive amount paid to the oppressive party.\textsuperscript{80} To

\textsuperscript{76} The courts have given this special treatment to marital, public service and insurance relationships: where a husband has threatened to abandon his wife and three small children if she did not mortgage her separate property to secure his creditor, see Line v. Blizzard, 70 Ind. 23 (1880); where a public utility has threatened to turn off services to procure payments in excess of authorized rates, see Carol City Util., Inc. v. Miami Gardens Shopping Plaza, Inc., 165 So.2d 199 (Fla. App. 1964) (water and sewer connections); Barry v. Commonwealth Edison Co., 374 Ill. 473, 29 N.E.2d 1014 (1940) (electricity); Saginaw v. Consumers Power Co., 304 Mich. 491, 8 N.W.2d 149 (1940) (gas); and where an insurance company has threatened to cancel a life insurance policy (providing for waiver of premiums during total and permanent disability) unless the insured, who contended disability, continued making payments, see New York Life Ins. Co. v. Talley, 72 F.2d 715 (8th Cir. 1934); Pacific Mut. Life Ins. Co. v. McCaskill, 126 Fla. 82, 170 So. 579 (1936); Wenstrom v. Aetna Life Ins. Co., 55 N.D. 647, 215 N.W. 93 (1927); Still v. Equitable Life Assur. Soc'y, 165 Tenn. 224, 54 S.W.2d 947 (1932).

\textsuperscript{77} See, e.g., B & B Amusement Enterprises, Inc. v. City of Boston, 297 Mass. 307, 308, 8 N.E.2d 788, 789 (1937), where the court said:

Nor do we think that in a case of this kind the plaintiff need show the purposes for which it wanted the water or the importance or necessity of having it. It is enough that the plaintiff had an immediate right to the water and would have been deprived of that right if it had not submitted to the unlawful exaction.

\textsuperscript{78} 2 G. Palmer, supra note 74, § 9.12, at 316.


\textsuperscript{80} Normally, the remedy for duress is in the nature of a quasi-contractual action for money had and received. Because the principal economic function of duress has been to redress unjust enrichment, the normal recovery is the amount paid to the party to the extent the payment exceeds what was fairly owed. J. Calamari & J. Perillo, supra note 8, § 9-9, at 272; see Dawson, Economic Duress—An Essay in Perspective, 45 Mich. L. Rev. 253, 283-85 (1947). "Duress may also be raised by way of an affirmative defense to an action on the executory portion of the agreement." J. Calamari & J. Perillo, supra note 8, § 9-9, at 272. An example would be where an oppressed insured "settles" in a one-sided agreement.
PUNITIVE DAMAGES

constitute duress, there need not even be a breach, but only wrongful conduct. To constitute a punitive damages case against an insurance company, however, there must be the wrongful conduct plus a breach of contract.

Since there is an actual contract breach in one case but not the other, the nature of the harm in the two situations is different. In the duress situation, the promisee, by giving in to the promisor's demands, prevents the threatened breach; he can then seek the aid of the courts to abrogate the unfair agreement and enforce his original rights. In Vernon, however, the insurer breached the contract instead of making an attempt to negotiate. Moreover, the insurers refused to pay the insured the amount they conceded he was entitled to. Although his needs were immediate they abruptly and entirely cut off the insured from the relationship. In the duress case, since the promisee agrees to accept a lesser settlement than the original contract calls for, rescission of that settlement is a logical remedy. In the breach-of-contract situation, where the threatened breach is not avoided, the resulting harm may be more drastic. In Vernon, even a one-sided or partial settlement might have started the insured back on his way again. Instead, he had to wait two years to get any of the money he was entitled to. In the meantime he was paying rent simply to retain his demolished business site. He was unable to get the insurer to make any offer at all.

Thus, a promisor in the Vernon situation who chooses to make no offer at all, who gives the promisee no chance to escape the harm (as opposed to one who at least makes a one-sided settlement giving the promisee a way out) not only is able to draw income with the money it would have paid in a settlement, but also causes more harm to the promisee. In spite of the additional harm which often results in such a situation, jurisdictions not allowing the imposition of any extra damages encourage promisors not to make settlement attempts, and at the same time give harmed promisees a lesser remedy. Obviously the promisor's conduct is just as wrongful, if not more so, in the case where the promisee is not given a chance to escape the harm as in the case where he is given a way out. Although the wrongful behavior in the two cases is almost identical, in the case where the defendant has gone ahead and

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81 264 Ind. at 610-12, 349 N.E.2d at 181-82.
82 Id. at 611, 349 N.E.2d at 181.
83 Id. at 610, 349 N.E.2d at 181.
84 Id.
breached a contract, there can be no rescission remedy, for there is no contract to rescind. Consequently, if the defendant is to be required by the courts to do something other than pay regular contract damages it must be done under a different label, namely "punitive damages," which unlike the duress doctrine, has been subjected to the independent tort requirement.

It makes no sense to make the defendant pay damages in one case but not the other simply because of the different labels applied. The Vernon court finally recognized that regardless of the absence of an independent tort, the public has an interest in preventing oppressive conduct where traditional contract damages already are being awarded. That interest is demonstrated by the doctrine of duress.

**CONCLUSION**

The allowance in Indiana of punitive damages in contract actions against insurance companies where there is no independent tort does not represent a modification of existing law. Instead, it signifies that the courts are working to preserve traditional policies and the public interest.

Those public policies and interests can be found in some of the traditional exceptions to the punitive damage rule: the breach of promise to marry and the breach by a public service company; in the California tort of bad faith and unfair dealing; and in the doctrine of duress.

In all of these cases, more than a commercial bargain is at stake; the relationship between the parties is unique and of a quasi-public nature. There is an important public interest impressed upon these contracts which requires that the promisor who enters into such a crucial relationship make a nonoppressive attempt to do what he has promised. The Vernon court has recognized that the insurance contract falls into this category.

This is not a new idea. It is not a grave departure from traditional case law. The principle merely has been hidden behind the various labels discussed here. The Indiana approach is a refreshingly clear and sound solution to a familiar type of problem which will continue to surface in a variety of contexts. Hopefully, the
courts will appreciate fully its utility in their attempts to determine whether there is a public interest in preventing an oppressive breach of certain types of "private" contracts.

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