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Contracts - Damages - Punitive Damages Awarded for Breach Accompanied by Fraudulent Act

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CONTRACTS—DAMAGES—PUNITIVE DAMAGES AWARDED FOR BREACH ACCOMPANIED BY FRAUDULENT ACT—Defendants contracted to purchase a crop of alfalfa from plaintiff, harvesting and processing to be done by defendants and payment to be ascertained according to the processed weight of the alfalfa. When defendants harvested the entire crop but failed to pay for the major part of it, plaintiff brought action for breach of contract. In addition to the non-payment, plaintiff alleged fraud on defendants' part in falsifying weight records and in otherwise scheming to cheat and defraud him. On defendants' appeal from a judgment including both compensatory and punitive damages, *held*, affirmed. Although punitive damages are not ordinarily recoverable in an action for breach of contract, they may be awarded if the breach is accompanied by a fraudulent act, wanton in character and maliciously intentional. *Whitehead v. Allen*, (N.M. 1957) 313 P. (2d) 335.

The traditional rule that punitive damages are not recoverable in an action for breach of contract has been justified on various grounds,¹ and

¹ These have included a desire to restrict the entire field of punitive damages, a feeling that the most the law attempts to do in actions for breach of contract is to put the injured party in the financial condition he would have been in had the breach not occurred, and an unwillingness to apply principles of damages which might lead to uncertainty and confusion in commercial affairs. *Addis v. Gramophone Co.*, [1909] A.C. 488. See McCORMICK, DAMAGES §81, p. 291 (1935).

although a few carefully defined exceptions have been recognized,² the majority of the jurisdictions which have considered the problem still adhere to the rule.³ An increasing number of jurisdictions, however, have recognized an exception to the rule when defendant's conduct has gone beyond mere breach of contract. In the principal case, punitive damages were awarded when the breach was "accompanied by a fraudulent act, wanton in character and maliciously intentional."⁴ Several other states have allowed such recovery if the breach of contract also was accompanied by or contained the elements of an aggravated tort.⁵ Two states, South Carolina and Texas, have long permitted punitive damages for certain types of breach of contract. In South Carolina it now seems to be well settled that a fraudulent act accompanying the breach will permit the

² The most significant exception has been the breach of promise to marry. McCormick suggests that this stands apart because the marriage relation itself is more than a contract obligation and is given more protection by the law than are ordinary contracts. MCCORMICK, DAMAGES §81, p. 291 (1935). Another exception is the refusal by a banker to honor a depositor's check when there are sufficient funds on deposit to meet it. See *Addis v. Gramophone Co.*, note 1 *supra*. Numerous cases involving breach of duty by common carriers and other public service companies have included awards of punitive damages; however, these cases are often treated as tortious breaches of special public duties. See MCCORMICK, DAMAGES §81, pp. 238-289 (1935).

³ In ten states this determination has been by judicial decision: *Alabama*, *Western Union Telegraph Co. v. Benson*, 159 Ala. 254, 48 S. 712 (1908); *Colorado*, *Sams v. Curfman*, 111 Colo. 124, 137 P. (2d) 1017 (1943); *Illinois*, *Hayes v. Moynihan*, 52 Ill. 423 (1869); *Kentucky*, *Cumberland Telephone & Telegraph Co. v. Sutton*, 156 Ky. 191, 160 S.W. 949 (1913); *Missouri*, *Williams v. Kansas City Public Service Co.*, (Mo. 1956) 294 S.W. (2d) 36; *New York*, *Duche v. Wilson*, 37 Hun (N.Y.) 519 (1885); *Oregon*, *Weaver v. Austin*, 184 Ore. 586, 200 P. (2d) 593 (1948); *Pennsylvania*, *Hoy v. Gronoble*, 34 Pa. (10 Casey) 9 (1859); *Tennessee*, *Bland v. Smith*, 197 Tenn. 683, 277 S.W. (2d) 377 (1955); *West Virginia*, *Hurxthal v. Boom Co.*, 53 W. Va. 87, 44 S.E. 520 (1903). Three states have reached the same result by statute: *California*, *Chelini v. Nieri*, 32 Cal. (2d) 480, 196 P. (2d) 915 (1948); *Croghan v. Metz*, 47 Cal. (2d) 398, 303 P. (2d) 1029 (1956), citing Cal. Code (Deering, 1949) §3294; *Georgia*, *Nichols v. Williams Pontiac, Inc.*, (Ga. App. 1957) 98 S.E. (2d) 659, citing Ga. Code Ann. (1935) §20-1405; *Oklahoma*, *Sinclair Refining Co. v. Shaffer*, 177 Okla. 610, 61 P. (2d) 571 (1936), citing what is now 23 Okla. Stat. Ann. (1955) §§9, 21. Four other states have completely rejected punitive damages in any civil action: *Louisiana*, *Janssen Catering Co. v. Abadie*, 157 La. 357, 102 S. 428 (1924); *Massachusetts*, *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N.E. 1 (1891); *Nebraska*, *Boyer v. Barr*, 8 Neb. 68 (1878); *Washington*, *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P. 1072 (1891).

⁴ Principal case at 336.

⁵ The courts have expressed this requirement of independently tortious conduct in various ways. In the following cases the tests indicated were announced for the recoverability of punitive damages: *Chicago, Rock Island & Pacific Ry. Co. v. Whitten*, 90 Ark. 462, 119 S.W. 835 (1909) (conduct that was willful, wanton, or consciously indifferent to consequences from which malice may be inferred); *Griffith v. Shamrock Village, Inc.*, (Fla. 1957) 94 S. (2d) 854 (breach accompanied by some intentional wrong, abuse, insult, or gross negligence amounting to an independent tort); *D. L. Fair Lumber Co. v. Weems*, 196 Miss. 201, 16 S. (2d) 770 (1944) (breach attended by such gross negligence or willful wrong as to amount to a tort); *Forrester v. Southern Pacific Co.*, 36 Nev. 247, 134 P. 753 (1913) (breach independently tortious); *Wright v. Everett*, 197 Va. 608, 90 S.E. (2d) 855 (1956) (breach amounts to an independent, willful tort under proper allegations of malice, wantonness and oppression).

awarding of punitive damages,⁶ while in Texas the tests for recoverability have included circumstances of contumely,⁷ malicious or oppressive conduct,⁸ and breach occurring in such a manner as to constitute a tort.⁹ All states which allow such recovery base it on actions by defendant which accompany and aggravate the breach, rather than on the defendant's motives in breaching. It should be further noted that the defendants in many of these cases are common carriers or public utilities and that punitive damages could be justified for violation of their special kind of duty owed the public.¹⁰ The decisions which have awarded punitive damages on the basis of malicious, willful, wanton, or oppressive conduct may well be criticized for injecting into the field of contract damages a substantial element of uncertainty. These terms are difficult to define precisely, and a breaching party would often be unsure as to whether his conduct attending the breach might be interpreted to impose a liability for punitive damages. If, however, awarding punitive damages is limited to those cases where the breach has been accompanied by an intentional fraudulent act, there is much in favor of it. Allowing such damages in a contract action in cases where they could also have been allowed if plaintiff had elected to bring a tort action for deceit¹¹ on the same facts will not lead to any great uncertainty or confusion in commercial affairs. Since under modern code pleading the plaintiff pleads facts rather than a form of action, he should be allowed to recover the type and amount of damages that these facts warrant.¹² The New Mexico court is to be commended for adopting a liberal, although still a minority, position on the recoverability of punitive damages in actions for breach of contract.

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⁶ In *Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904) the rule was stated that punitive damages could be recovered if the breach was accompanied by a fraudulent act. The later case of *Winthrop v. Allen*, 116 S.C. 388, 108 S.E. 153 (1921), seemed to add the possibility that such damages might be recovered where defendant's conduct was merely wanton or willful, but this possibility was removed by *Holland v. Spartanburg Herald-Journal Co.*, 166 S.C. 454, 165 S.E. 203 (1932), which distinguished the *Winthrop* case as being in tort rather than contract and reaffirmed the requirement of a fraudulent act accompanying the breach. See annotation to the *Holland* case, 84 A.L.R. 1345 (1933). For a recent decision following this rule see *Roberts v. Fore*, (S.C. 1957) 98 S.E. (2d) 766.

⁷ *Ball v. Britton*, 58 Tex. 57 (1882).

⁸ *Tignor v. Toney*, 13 Tex. Civ. App. 518, 35 S.W. 881 (1896) (action for conversion); *Schepes v. Giles*, (Tex. Civ. App. 1920) 222 S.W. 348; *National Finance Co. v. Abernathy*, (Tex. Civ. App. 1933) 66 S.W. (2d) 358.

⁹ *Etter v. Von Sternberg*, (Tex. Civ. App. 1951) 244 S.W. (2d) 321.

¹⁰ See *Chicago, Rock Island & Pacific Ry. Co. v. Whitten*, and *Forrester v. Southern Pacific Co.*, note 5 supra; *Carmichael v. Southern Bell Tel. & Tel. Co.*, 157 N.C. 21, 72 S.E. 619 (1911).

¹¹ Fraud is often mentioned in a general way as a possible ground for the award of punitive damages in a tort action; in an action for deceit itself, punitive damages are properly recoverable if the fraud is gross, or if there are circumstances clearly indicating malice and willfulness, such as a deliberate intent to injure plaintiff. See PROSSER, TORTS, 2d ed., §90, p. 570 (1955).

¹² CLARK, CODE PLEADING, 2d ed., §43, pp. 259-265 (1947).