

1957

Gordon C. McGavin v. Preferred Insurance Exchange et al : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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In the Supreme Court of the State of Utah

FILED

GORDON C. McGAVIN,

Plaintiff and Appellant, Clerk, Supreme Court, Utah

vs.

PREFERRED INSURANCE EXCHANGE,
... WAYNE MURRAY and WAYNE
MURRAY, JR., doing business as MUR-
RAY & COMPANY, a co-partnership,
UTAH MOTOR CLUB, INC., a corpora-
tion, and SAM ARGE,

Defendants and Respondents.

SEP 20 1957

No.

8714

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF THE FACTS

(a) *Preliminary Statement*

This is an appeal from a judgment of dismissal of the action entered by the District Court of Salt Lake County, Utah, on May 29, 1957, in civil No. 106,957 (R. 44-45). The motion to dismiss the amended complaint was filed by

defendants and respondents herein (R. 38). Preferred Underwriters, Inc., the attorney-in-fact for Preferred Insurance Exchange, is a foreign corporatoin which never has qualified to do business in Utah (R. 17, 33). No service of process has been obtained on said foreign corporation, and it is not one of the respondents on this appeal.

The motion to dismiss the amended complaint was based on the allegation that the said amended complaint "does not state any facts or grounds upon which relief can be granted against these defendants or any of them." (R. 38). The District Court furnished no explanation as a basis for granting the motion to dismiss.

(b) *The Amended Complaint*

The prime question to be determined on this appeal is whether the amended complaint states facts upon which relief can be granted against the defendants and respondents or any of them. We set forth the entire amended complaint, except for the title of the action (R. 28-32):

"The plaintiff comes now by leave of court first had and obtained, and files this amended complaint, whereby plaintiff complains against defendants and for cause of action alleges:

"1. Defendant Preferred Insurance Exchange, now is and was at all times herein mentioned, a reciprocal insurance exchange, unincorporated, transacting business through and under its attorney-in-fact, Preferred Underwriters, Inc., a corporation not organized under the laws of the State of Utah. During the times herein-after mentioned, said Preferred Insurance Exchange has engaged in business in the State of Utah through

state, district and local agents, writing automobile and liability insurance.

"2. Defendant Preferred Underwriters, Inc., in addition to acting as attorney-in-fact for Preferred Insurance Exchange, since about January, 1955 has been engaged in business in the State of Utah as a general insurance agency for writing of fire insurance and other insurance. Said Preferred Underwriters, Inc., has never qualified to do business in the State of Utah as a foreign corporation.

"3. Defendants Wayne Murray and Wayne Murray, Jr., were at all times herein mentioned, a co-partnership engaged in the insurance business as Murray & Company. Defendant Wayne Murray, Jr., was at all times herein mentioned the president and general manager of Preferred Insurance Exchange, and also the president and general manager of Preferred Underwriters, Inc., a foreign corporation.

"4. Defendant Utah Motor Club, Inc., now is and was at all times herein mentioned, a corporation of Utah. Defendant Sam Arge was at all times herein mentioned, general manager of said Utah Motor Club, Inc.

"5. On or about January 20, 1955, Preferred Underwriters, Inc., as attorney-in-fact for Preferred Insurance Exchange, by written instrument appointed Paul J. Parish, of Montebello, California, as state agent in Utah for Preferred Insurance Exchange. Preferred Underwriters, Inc., also appointed Paul J. Parish as state agent in Utah to write fire insurance and other insurance. Wayne Murray and Wayne Murray, Jr., doing business as Murray & Company, also appointed Paul J. Parish as state agent in Utah to write life insurance and other insurance. Said defendants instructed Paul J. Parish to set up an office in Utah and to appoint such agents as said Parish deemed essential to establish an

organization through which automobile, casualty, fire, liability, life and other insurance could be sold in the State of Utah.

“6. On or about March 10, 1955, said Paul J. Parish, state agent for said defendants, entered into agreement with plaintiff whereby plaintiff was appointed an agent for Preferred Insurance Exchange and an agent for Preferred Underwriters, Inc., in Utah, and plaintiff was also appointed acting state agent to assist said Paul J. Parish in the management of the state agency for Preferred Insurance Exchange and for Preferred Underwriters, Inc. Paul J. Parish promised that plaintiff would be paid the regular agent's commission on all policies sold directly by him and also receive a share of the overriding commissions on all insurance sold in the State of Utah for Preferred Insurance Exchange, until the plaintiff received \$1,000.00 per month. Said Paul J. Parish told plaintiff that plaintiff would have an opportunity for permanent employment at a substantial income.

“7. Said defendants were informed of said appointment and employment, and about April 1955, defendants Preferred Insurance Exchange and Preferred Underwriters, Inc., approved and acquiesced in said appointment and employment of plaintiff as an agent for said companies and as acting state agent in Utah. Said defendants instructed plaintiff to procure state licenses from the State of Utah to sell automobile and fire insurance, which plaintiff did; and said two defendants told plaintiff to proceed to appoint district and local agents, and said defendants promised to file with the State Insurance Department a power of attorney authorizing him to appoint agents. Said defendants also promised: (a) To furnish promptly to plaintiff advertising matter to start a sales campaign; (b) to promptly file with the State Insurance Department, all necessary rate schedules essential to meet competitors, to enable

plaintiff and local agents to obtain a substantial volume of business; (c) to file any other documents which might be essential to carry on a diversified insurance business in Utah; (d) to furnish plaintiff without delay assistance in the training of agents for selling insurance; and (e) to give plaintiff such further assistance as would be necessary to build up a state organization in Utah to assure Paul J. Parish and plaintiff a good volume of business and a substantial income.

"8. Said defendants further told plaintiff that he should not concern himself with quotas in Utah for the time being, nor be too much concerned about selling policies himself, but that he should direct his chief efforts to finding suitable agents, to help train agents, to take care of administrative work, to conduct investigations requested by said defendants, and to make other contacts deemed essential by defendants to promote good public relations. Defendants told plaintiff that he would make a substantial income out of overriding commissions from future business in Utah, and that notwithstanding some time would elapse before such income would be obtained, as the program was a long range program, he would obtain a much greater income than if he spent his time selling.

"9. Plaintiff relied on the promises of said Preferred Insurance Exchange, Preferred Underwriters, Inc., and Murray & Company, and plaintiff traveled through the State at his own expense to find suitable agents for Preferred Insurance Exchange, and said defendants recognized said agents so appointed. Plaintiff conducted all of the investigations requested by said defendants, made all of the contacts requested by defendants, and performed all other administrative duties assigned to him between April and October 1955, all at his own expense.

"10. Said defendants failed and neglected to perform their promises as set forth in paragraph 7 hereof: (a)

Preferred Insurance Exchange and Preferred Underwriters, Inc., as attorney-in-fact for Preferred Insurance Exchange, sent advertising material which was false and misleading, in that said advertising material represented that Preferred Insurance Exchange offered lower rates than competitors, when in fact some rates were higher; and notwithstanding plaintiff informed defendants that said material was having an adverse effect in Utah, said defendants did not make any new advertising material available until September 1955, just prior to time Preferred Underwriters, Inc., appointed Utah Motor Club, Inc., state agent for Preferred Insurance Exchange. (b) Said defendants did not file any competitive rate schedules until July 1955, nor until plaintiff conducted the investigations requested by said defendants. (c) Said defendants delayed until September 1955, the sending of any representative to Utah to give assistance in a sales training program. (d) Said defendants neither filed a power of attorney for plaintiff, nor filed the necessary documents essential to qualify Preferred Insurance Exchange and Preferred Underwriters, Inc., to engage in business in Utah. (e) Instead of giving plaintiff assistance essential to help build a state organization in Utah to assure Paul J. Parish and plaintiff a good volume of business and a substantial income, after learning that plaintiff had contacted Utah Motor Club, Inc., in an effort to appoint said corporation a district agent, said Preferred Insurance Exchange, Preferred Underwriters, Inc., and Murray & Company, without the consent of plaintiff and without the consent of Paul J. Parish, entered into an agreement with Utah Motor Club, Inc., and Sam Arge, whereby Utah Motor Club, Inc., on or about September 28, 1955, was appointed state agent in Utah for Preferred Insurance Exchange by Preferred Underwriters, Inc., notwithstanding Preferred Insurance Exchange and Preferred Underwriters, Inc., and Murray and Company promised plaintiff that no deal would be made

with Utah Motor Club, Inc., except one which would be satisfactory to plaintiff. (f) Said defendants also procured from plaintiff the list of contacts of insurance prospects from plaintiff in October 1955, for the purpose of giving the same to Utah Motor Club, Inc., to enable Utah Motor Club, Inc., to reap benefits from the efforts of the plaintiff. (g) Said defendants Preferred Insurance Exchange, Preferred Underwriters, Inc., and Murray & Company, in September 1955, induced plaintiff to go to the expense and take the time necessary to arrange for a meeting of all district and local agents, on the promise that he was going to have a substantial income from his position, while at the same time said defendants were negotiating behind the back of plaintiff to deprive plaintiff of present and future compensation by way of overriding commissions which said defendants had promised, and to transfer the business over to Utah Motor Club, Inc., without compensation to plaintiff whatsoever.

"II. Plaintiff was given no notice of termination of his employment, nor any compensation for his services. By the acts of the defendants they made it impossible for Paul J. Parish to perform his agreement with plaintiffs, notwithstanding Preferred Insurance Exchange and Preferred Underwriters, Inc., and Murray & Company approved said appointment made by Paul J. Parish and induced plaintiff to perform services for seven months. In October 1955, said defendants falsely represented that Paul J. Parish had resigned as state agent, and that plaintiff should contact Sam Arge of Utah Motor Club, Inc. Thereupon, about November 1, 1955, Utah Motor Club, Inc., informed plaintiff that it had been appointed state agent in place of Paul J. Parish, and that the only way plaintiff would be allowed to sell insurance was to sell to people who would buy membership in Utah Motor Club, Inc. In November 1955 the State Insurance Department advised plaintiff that he could not sell insurance under such a plan

as said arrangement was unauthorized by the State and said plan was illegal. Plaintiff was thereby hindered and prevented from performing any further services for said defendants by their own acts.

"12. By said acts of defendant companies they repudiated their agreement with plaintiff whereby they induced plaintiff to render various services in building up a state organization on the promise of substantial overriding commissions in the future, although plaintiff performed in good faith for more than seven months the service required of him, to his damage in the sum of \$10,000.00. In addition to cutting off the means of receiving said overriding commissions, to completely deprive the plaintiff of the fruits of his labors, Preferred Insurance Exchange paid the balance of his regular commissions to Utah Motor Club, Inc. Plaintiff alleges that by their conduct defendants manifested an intention to deprive plaintiff of not only the fruits of his labors, but to devise a scheme to have him work without compensation, and that it would be appropriate to assess punitive damages against defendants in the sum of \$25,000.

"WHEREFORE, plaintiff prays judgment against defendants in the sum of \$10,000.00 actual damages, for \$25,000.00 exemplary damages, for an accounting on commissions and overriding commissions, for costs and other appropriate relief."

STATEMENT OF POINTS ON WHICH APPELLANT RELIES FOR REVERSAL OF THE JUDGMENT

1. A motion to dismiss admits the truth of the allegation of the pleading which it assails.
2. The amended complaint states facts which show that

plaintiff is entitled to recover at least for services performed during a seven months' period and for expenses incurred in connection therewith at the instance and request of Preferred Insurance Exchange.

3. Preferred Underwriters, Inc., a noncomplying foreign corporation, attorney-in-fact for Preferred Insurance Exchange, is not an indispensable party to this action.

4. All of the defendants are liable in tort for unconscionable dealings behind the back of plaintiff.

ARGUMENT

I.

A MOTION TO DISMISS ADMITS THE TRUTH OF THE ALLEGATIONS OF THE PLEADING WHICH IT ASSAILS.

In the case of *Fargo Glass & Paint Co. v. Globe American Corp.*, 161 F. 2d 811, the Court of Appeals held that the facts alleged in the pleading are admitted by the motion to dismiss. "If the plaintiff is entitled to any relief under these facts, the motion to dismiss should have been overruled. Federal Rules of Civil Procedure, Rule 8 (a) 28 U. S. C. A. following section 723 c; *Guth v. Texas Co.*, 7 Cir., 155 F. 2d 563."

II.

THE AMENDED COMPLAINT STATES FACTS WHICH SHOW THAT PLAINTIFF IS ENTITLED TO RECOVER AT LEAST FOR SERVICES PERFORMED DUR-

ING A SEVEN MONTHS' PERIOD AND FOR EXPENSES INCURRED IN CONNECTION THEREWITH AT THE INSTANCE AND REQUEST OF PREFERRED INSURANCE EXCHANGE.

This is *not* a case where an agent was employed on a commission basis with unlimited opportunity in a given territory, and given the necessary tools to work with as an agent, and then the relation of principal and agent was terminated. This is a case where plaintiff was appointed agent and also state manager for a reciprocal insurance exchange which was just getting started in Utah. Said insurer and its attorney-in-fact not only approved his appointment as agent, but gave directions to him to perform various services for said insurer, to appoint and train other agents, make various contacts, perform administrative work and other things for said insurer, on the promise that he would be compensated by overriding commissions on a substantial volume of future business. In this case the insurer discouraged the plaintiff from spending very much time writing insurance, and induced him to spend approximately seven months to build up a sales organization; and after plaintiff performed those services at his own expense, the insurer and its attorney-in-fact made it impossible for him to reap the fruits of his labors by turning the state agency and its management over to Utah Motor Club, Inc., which plaintiff previously had contacted with a view of making it a district agency.

The appropriate rule applicable to the fact situation of this case is stated in *Beebe v. Columbia Axle Co.*, 233 Mo. App. 212, 117 S. W. 2d 624, at 629:

“The limitation is that, in case of an indefinite agency where it is revoked by the principal, if it appears that the agent, induced by his appointment, has in good faith incurred expense and devoted time and labor in the matter of the agency without having had a sufficient opportunity to recoup such from the undertaking, the principal will be required to compensate him in that behalf; for the law will not permit one thus to deprive another of value without awarding just compensation. The just principle acted upon by the courts in the circumstances suggested requires no more than that, in every instance, the agent shall be afforded a reasonable opportunity to avail himself of the primary expenditures and efforts put forth to the end of executing the authority conferred upon him and that, if such opportunity is denied him, the principal shall compensate him accordingly.”

The foregoing rule was quoted and adopted in the case of *Fargo Glass & Paint Co. v. Globe American Corporation*, 161 F. 2d 811. The court adopted the Missouri rule to the effect that an orally appointed agent for an indefinite time, who, induced by his appointment, has in good faith incurred expenses and devoted time and labor to the agency without having had sufficient opportunity to recoup, is entitled to compensation therefor from his principal. In the Fargo case, “The defendant says it may cancel the contract with impunity.” The Court of Appeals held otherwise.

It was argued in the District Court that plaintiff was appointed by Paul J. Parish, and that plaintiff should look to Parish for compensation. The amended complaint shows that Preferred Underwriters, Inc., appointed Parish state agent, and directed him to appoint other agents and to build up a state organization. Furthermore, the amended complaint shows

that *after* plaintiff was appointed an agent for Preferred Insurance Exchange and acting state manager, said Preferred Insurance Exchange and its attorney-in-fact *approved* said appointment and gave instructions and directions to the plaintiff. Said two companies instructed him to appoint other agents and train agents which he did, and said companies recognized the agents so appointed.

In *Hall v. Douglas Aircraft Co.*, (Cal. App.), 73 P. 2d 668 (hearing denied by Supreme Court), it was pointed out that where a principal ratifies the appointment of a subagent and gives directions to the subagent in conducting negotiations, the principal constitutes such subagent its own agent. Furthermore, the court held in that case that the principal could not defeat the right to compensation on a contingent basis by wiping out the margin or "differential" on which the contingent compensation was to be computed. The District Court of Appeal held that the agent was entitled to reasonable value of his services under such circumstances.

In the case of *Hoyt v. Wasatch Homes, Inc.*, 1 Utah 2nd 9, 261 P. 2d 927, this Honorable Court recognized the basic rule that a principal who agrees that commission shall be paid only on a consummated sale, contemplates the duty of the principal to cooperate in good faith toward the consummation of a sale, and that the principal cannot defeat the right of the agent to compensation by arbitrarily refusing to cooperate.

Restatement of the Law, Agency, Chapter 14, deals with duties of the principal to the agent. There are a number of significant obligations of the principal for fair dealing with an agent:

"A principal is subject to a duty to an agent to perform the contract which he has made with the agent." (Page 1000).

"A principal has a duty not to repudiate or terminate the employment in violation of the contract of employment." (Page 1060).

"If the compensation of the agent is dependent upon his accomplishment of a result and this result can be accomplished only if the principal cooperates, the principal's promise to give such cooperation is inferred unless there are manifestations to the contrary." (Page 1002).

"Except where the relationship of the parties, the triviality of the services, or other circumstances indicate that the parties have agreed otherwise, it is inferred that one who requests or permits another to perform services for him as his agent promises to pay for them." (Page 1027).

"A principal for whom an agent has performed services in accordance with a voidable contract which is avoided by one of the parties, or for whom an agent or purported agent has performed services without a promise by the principal to pay, is subject to liability to the agent to the extent that he has been unjustly enriched by such services." (Page 1077).

"A principal is subject to liability to an agent for his own conduct as he is to third persons for similar conduct . . ." (Page 1104).

". . . Correlative with the duties of the agent to serve loyally and obediently are the principal's duties of compensation, indemnity, and protection. . . . In addition, the principal is subject to liability to the agent, as to any third person, for conduct which would be tortious aside from the relationship, and is subject to quasi-contractual liability if he is unjustly enriched at the agent's expense." (Page 999).

The amended complaint does not merely show that plaintiff had a valuable and attractive contract with Paul J. Parish whereby he could expect \$1,000.00 per month. The amended complaint shows that in April 1955 said Preferred Insurance Exchange and its attorney-in-fact, Preferred Underwriters, Inc., made an express agreement with plaintiff which said insurance companies violated with impunity after inducing plaintiff to work for seven months performing various services for Preferred Insurance Exchange on the promise that he was going to reap a very substantial harvest of overriding commissions in the future. The amended complaint shows that said companies arbitrarily and maliciously deprived plaintiff of opportunity to receive those commissions which he had been promised, and made it impossible for Parish to perform his contract with plaintiff. There was more than a mere implied promise on the part of Preferred Insurance Exchange. The bargain was not merely to be paid a commission on the policies he sold personally, but to receive in the future overriding commissions on the sales made by others.

In giving instructions and directions to plaintiff, said companies as principal and as attorney-in-fact, told plaintiff to procure for himself state licenses to sell automobile and fire insurance, which he did; and to proceed to appoint district and local agents, which he did in reliance on the promise of said companies; and that plaintiff traveled through Utah for seven months at his own expense to find suitable agents for Preferred Insurance Exchange, and said defendants recognized the agents he appointed. Said companies also told plaintiff not to concern himself with quotas for the time being, nor be

too much concerned about selling policies himself, but to direct his chief efforts to finding suitable agents, to help train agents, to take care of administrative work, to conduct investigations requested by said defendants, and to make other contacts deemed essential to said defendants to promote good public relations. Said companies told plaintiff that he would make a substantial income out of overriding commissions from future business in Utah, and that notwithstanding some time would elapse before such income would be obtained, as the program was a long range program, he would obtain a much greater income than if he spent his time selling. Plaintiff performed all services requested.

The amended complaint shows that said two companies made the following promises to induce plaintiff to perform a variety of services, on which promises plaintiff relied in good faith in performing services, and which promises said companies failed to perform:

(1) Defendants promised to furnish promptly to plaintiff effective advertising matter to start a sales campaign. Instead, Preferred Insurance Exchange, and Preferred Underwriters, Inc., (its attorney-in-fact), sent plaintiff advertising material which was false and misleading, which represented that Preferred Insurance Exchange offered lower rates than competitors, when in fact some rates were higher. Although plaintiff informed said defendants that said material was having an adverse effect in Utah, said defendants did not make any new advertising material available until September 1955, just prior to the time Utah Motor Club, Inc., was appointed state agent for Preferred Insurance Exchange by Preferred Underwriters, Inc.

Sections 31-27-8 and 9, U. C. A. 1953, prohibit the dissemination and circulation of false information or misrepresentation of the benefits of a policy. Consequently, the defendants did not give plaintiff the tools to work with which were expressly promised as a means of enabling plaintiff to obtain a substantial income.

(2) Said defendants promised to file with the State Insurance Department all necessary rate schedules essential to meet competitors, to enable plaintiff and local agents to obtain a substantial volume of business. Said defendants did not file any competitive rate schedules until July 1955, nor until plaintiff himself conducted the investigations requested by said defendants. Said defendants then turned the state agency over to Utah Motor Club, Inc., and made it impossible for plaintiff to get any volume of business at all.

(3) Said defendants promised to file any other documents which might be essential to carry on a diversified insurance business in Utah. Said defendants did not even file a power of attorney for plaintiff, nor file the necessary documents essential to fully qualify said defendants to engage in business in Utah.

(4) Said defendants promised in April to furnish without delay assistance in the training of agents for selling insurance. The defendants delayed until September the sending of any representative to Utah to give any assistance in a sales training program. Then it made a deal to oust the plaintiff and to deny him the promised benefits of such a program.

(5) Said defendants promised to furnish plaintiff such

further assistance as would be necessary to build up a state organization in Utah to assure Parish and plaintiff a good volume of business and a substantial income. Plaintiff relied on all of the promises of said defendants, and traveled through Utah at his own expense to find suitable agents for Preferred Insurance Exchange, who were recognized as agents by said defendants; and plaintiff conducted all investigations requested by defendants, made all contacts requested and performed all other administrative duties assigned to him by said two defendant companies between April and October 1955, at his own expense. Instead of giving plaintiff assistance essential to help build up a state organization in Utah to assure Parish and plaintiff a good volume of business and a substantial income, after learning that plaintiff had contacted Utah Motor Club, Inc., in an effort to appoint said corporation a district agent, Preferred Insurance Exchange, Preferred Underwriters, Inc., and Murray & Company, without the consent of either Parish or plaintiff on or about September 28, 1955, entered into an agreement with Utah Motor Club, Inc., whereby said motor club was appointed state agent in Utah. Said defendants procured from plaintiff his list of contacts of insurance prospects for the purpose of giving the same to Utah Motor Club, Inc., to reap benefits from the efforts of plaintiff without compensation. In September 1955, said Preferred Insurance Exchange and Preferred Underwriters, Inc., induced plaintiff to go to the expense and take the time necessary to arrange for a meeting of all district and local agents, on the promise that he was going to have a substantial income from his position, while at the same time said companies were negotiating behind his back to deprive him of present and future overriding commissions

which he had been promised, and to transfer the business over to Utah Motor Club, Inc., without any compensation to plaintiff whatsoever, and to make it impossible for Parish to perform his contract with plaintiff.

Plaintiff was not given notice of termination of his employment, nor compensation for his services. In October 1955, said companies falsely represented to plaintiff that Parish had resigned as state agent, and instructed him to contact Utah Motor Club, Inc. About November 1, 1955, said Utah Motor Club, Inc., told plaintiff it had been appointed state agent and that the only way he would be allowed to sell insurance was to sell to people who would buy membership in the Utah Motor Club, Inc. The State Insurance Department advised plaintiff that such an arrangement was unauthorized and that said plan was illegal. (Such practices are prohibited by Sections 31-27-14, 15 and 22, U. C. A. 1953). The plaintiff was thereby hindered and prevented from performing any further services for said insurance companies, and the means of receiving the promised overriding commissions was cut off. The plaintiff performed services for seven months on the promise that he would receive a substantial overriding commission in the future.

This case is a much stronger case than the one mentioned in the Fargo case where notice of termination was given, and in which case the judgment of dismissal was reversed.

III.

PREFERRED UNDERWRITERS, INC., A NONCOM-
PLYING FOREIGN CORPORATION, ATTORNEY-IN-

FACT FOR PREFERRED INSURANCE EXCHANGE, IS NOT AN INDISPENSIBLE PARTY TO THIS ACTION.

The fact that Preferred Underwriters, Inc., could not be served with summons because it is a noncomplying foreign corporation, which has failed to have a process agent in this State, does not show that its principal Preferred Insurance Exchange is immune from liability.

The amended complaint alleges that Preferred Insurance Exchange was and is an unincorporated reciprocal insurance exchange in business in Utah through state, district and local agents, writing automobile and liability insurance. Preferred Underwriters, Inc., was and is the attorney-in-fact for Preferred Insurance Exchange, but said Preferred Underwriters, Inc., is a foreign corporation engaged in business in Utah as a general insurance agency for writing fire and other insurance, although it has never qualified to do business in Utah. The fact that service of summons was obtained on Preferred Insurance Exchange indicates that it has a process agent in Utah. The statutes do not require the attorney-in-fact to be joined in a suit against a reciprocal insurer.

Section 31-10-3, U. C. A. 1953, specifies:

“A ‘reciprical insurer’ as used in this code means any such unincorporated aggregation of subscribers operating through an attorney in fact individually and collectively as an insurance organization for the benefit of its policyholders.”

Section 31-10-11, U. C. A. 1953, defines the rights and powers of an attorney-in-fact for a reciprocal insurer:

“(1) The rights and powers of the attorney of a reciprocal insurer shall be as provided in the power of attorney given it by the subscribers.

“(2) The power of attorney must set forth:

“(a) The powers of the attorney;

“(b) That the attorney is empowered to accept service of process on behalf of the insurer and to authorize the commissioner to receive service of process in actions against the insurer upon contracts exchanged;

* * *

Notwithstanding the attorney-in-fact for a reciprocal insurer or exchange can make contracts for the reciprocal insurer, our statute which permits the operation of reciprocal insurance exchanges, specifically declares that a reciprocal insurer may “*sue and be sued in its own name*” (Sec. 31-10-6, U. C. A. 1953). The statute clearly indicates that the reciprocal insurer may be sued as principal; and the mere fact that its attorney-in-fact is a noncomplying foreign corporation which has failed to appoint a process agent in the State of Utah, does not prevent an injured party from suing the insurance exchange as principal for the acts or omissions of the principal and its attorney-in-fact acting on behalf of the reciprocal insurer.

Section 16-8-3, U. C. A. 953, referring to the disabilities of noncomplying foreign corporations, states that “every contract, agreement and transaction whatsoever made or entered into by or on behalf of any such corporation within this state shall be wholly void on behalf of such corporation and its assignees and every person deriving any interest or title therefrom, but shall be valid and enforceable against such corporation, assignee and person; and any person acting as agent of

a foreign corporation which shall neglect or refuse to comply with the foregoing provisions is guilty of a misdemeanor and shall be personally liable on any and all contracts made in this state by him for or on behalf of such corporation during the time that it shall be so in default.”

The contract made by Preferred Underwriters, Inc., at attorney-in-fact for Preferred Insurance Exchange, with Parish and also the contract made with plaintiff subsequently, were contracts to be performed in this State. Neither Parish nor plaintiff consented to the abrogation of those agreements. To deny to a noncomplyng foreign corporation the right to maintain any action to enforce the same, while making such contracts enforceable against such corporation and its beneficiary, would be nullified entirely if a noncomplying foreign corporation acting as agent can make a contract which it can repudiate at will after it has obtained the benefits it seeks for its principal. It would seem that the right to cancel a contract is a contract right, and that the disability to exercise a contract right by a noncomplying foreign corporation precludes the exercise of a right to terminate an agreement. If it does not, that still would not make the conduct lawful in this case, nor insulate the principal from liability. A reciprocal insurer which acts through a noncomplying foreign corporation certainly does not have greater rights and immunities by reason of such non-compliance with the law than it would have if the attorney-in-fact were qualified under the laws of this State.

Obviously, the statutes contemplate that an attorney-in-fact for a reciprocal insurer shall be one which is qualified to transact business in this State. The failure to have a qualified

attorney-in-fact certainly does not exempt the reciprocal insurer from liability as principal, either in contract or in tort.

IV.

ALL OF THE DEFENDANTS ARE LIABLE IN TORT FOR UNCONSCIONABLE DEALING BEHIND THE BACK OF PLAINTIFF.

One of plaintiff's prospects for district agent was Utah Motor Club, Inc. Preferred Insurance Exchange, Preferred Underwriters, and Wayne Murray and Wayne Murray, Jr., knew of the contract relationship with plaintiff. Said defendants other than Utah Motor Club, Inc., induced the plaintiff to perform additional services in September 1955 on the promise that he would reap a substantial income from future overriding commissions, and in connection therewith had him go to the expense of a sales conference with the various agents. Said defendants behind the plaintiff's back and without the knowledge or approval of Paul J. Parish, made a deal with Utah Motor Club, Inc., to make it impossible for said defendants to perform their agreement with plaintiff to pay overriding commissions. In addition, they made it impossible for plaintiff to do any selling or to obtain the fruits of his seven months' work. Furthermore, said defendants arranged to transfer to Utah Motor Club, Inc., plaintiff's list of insurance prospects, and also paid over to Utah Motor Club, Inc., the balance of the regular commissions which plaintiff had earned. Utah Motor Club, Inc., knew of plaintiff's position, and it had no right to take those funds, nor to aid in the scheme to circumvent plain-

tiff's position and destroy his right to receive overriding commissions on future business.

As pointed out in *Restatement of the Law, Agency*, page 999, a principal is liable to an agent for conduct which would be tortious aside from the relationship. Defendants made it impossible for plaintiff to perform any further services by requiring him to sell insurance on a basis which is prohibited by law, and which the State Insurance Department advised him would be illegal.

The tort rule is illustrated in *Skene v. Carayanis*, 103 Conn. 708, 131 A. 497, 498:

" . . . the principle . . . holds liable him who, knowingly and without adequate justification, causes another to breach his contract. *R and W Hat Shop, Inc. v. Sculley*, 98 Conn. 1,119 A. 55, 29 A. L. R. 551. The law does not, however, restrict its protection to rights resting upon completed contracts, but it also forbids unjustifiable interference with any man's right to pursue his lawful business or occupation, and to secure to himself the earnings of his industry. Full, fair, and free competition is necessary to the economic life of a community, but under its guise, no man can, by unlawful means, prevent another from obtaining the fruits of his labor. 'The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or, at least, must not be inconsistent with their free operation. No man can justify interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction, or molestation.' *Martell v. White*, 185 Mass. 255, 261, 69 N. E. 1085, 1088, 64 L.R.A. 260, 102 Am. St. Rep. 341; *Auburn Draying Co. v. Wardell*, 227 N. Y. 1, 11, 124 N. E. 97, 6 A. L. R.

901; *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 31, 142 N. W. 930, 1136, L. R. A. 1915 B, 1179, 1195."

The defendants other than Utah Motor Club, Inc., promised plaintiff that they would make no agreement with Utah Motor Club, Inc., which would not be satisfactory to plaintiff. The law does not countenance the unconscionable conduct of a principal and its officers in dealing with a prospect of the agent to destroy the position and the promised economic future of the agent.

The plaintiff asked for \$10,000.00 general damages, and \$25,000.00 punitive damages. Both are justified.

CONCLUSION

The amended complaint states facts to warrant recovery against each of the defendants. The motion to dismiss should have been overruled, as the same is without merit. It was also error for the District Court to enter a judgment of dismissal, although the judgment was made "without prejudice." The plaintiff is entitled to judicial relief, as involuntary servitude would be accomplished if plaintiff were denied relief. We respectfully submit that the judgment of the District Court should be reversed, with costs to appellant, and that the cause should be remanded with directions to overrule the motion to dismiss.

Respectfully submitted,

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