ORAL ARGUMENT — 10/20/99
98-0994
LOPEZ V. HOCKEMA

DEVOE: Justice Oliver Wendel Holmes often wrote about the task of judicial line drawings, observing that it is the constant business of the law to draw difficult lines. He also acknowledged that even the broadest least controversial standard may well be arbitrary at the margin and wherever the law draws a line there will be cases very near each other on opposite sides of the line. Nevertheless, Justice Holmes encouraged courts not to be troubled by the question of where to draw the line, because that is the question in pretty much everything worth arguing in the law.

This case is indeed about judicial line drawing on at least one issue and possibly two issues. On the contract issue this case turns on where the court draws the line about when we can say that a case has been appealed to a higher court. We think the drawing of that line disposes of all the issues in this case.

O'NEILL: How does it dispose of the issue of - even if there is no breach of contract would you agree that there still may be an excessive fee charge?

DEVOE: It depends.

O'NEILL: I thought you were drawing lines.

DEVOE: I'm going to draw the lines. If we are talking about fiduciary duty, the way the fiduciary duty is pled in this case, it is absolutely dependent on the breach of contract claim.

O'NEILL: What if it weren't?

DEVOE: If it weren't it might be possible to allege other types of breaches of fiduciary duty that were not involved in this case that could result in a finding of a breach by the lawyers. But that's not been pled in this case because the two claims are identical. So that's why we say...

O'NEILL: Well I'm going to presume that opposing counsel is going to say we do reach that question, so would you respond to that?

DEVOE: As the court reaches the second question of fiduciary duty, the way that we say the line should be drawn is that the mere amount of the fee by itself does not constitute a breach of fiduciary duty unless it is unaccompanied by some other independent acts of the lawyer that would constitute a breach. For example, if there was evidence that the lawyer had persuaded the client to sign a fee contract that's unreasonable on its face, a 90% contingency fee, something like that, that's a separate act that would cause that to be a breach. If the lawyers are accused of...

HECHT: It's unreasonable on its face is the separate point?

DEVOE: Yes.

HECHT: Well why wouldn't that be true under their argument in this case, the argument is 5% for nothing done. Unreasonable on its face is basically their argument.

DEVOE: What the contract says on its face is if the case is appealed, then there is a higher fee. And there is no allegation that the original contract 40% in general and 45% if the case is appealed that that was unreasonable.

GONZALEZ: The contract also says for services rendered and to be rendered. What was rendered in connection with the 5%?

DEVOE: The contract says that for services rendered, the 40%. And then it also says, if the case is appealed to a higher court.

GONZALEZ: So there was no agreement between the parties that the lawyers render any services for the 5% is that what you are saying?

DEVOE: Not in the contract. That's right. The sentence that has the 45% doesn't say anything.

GONZALEZ: I can't think of a reasonable person that would enter into that kind of contract with an understanding that lawyers to receive an additional 5% for doing nothing.

DEVOE: What the contract says is that if the case is appealed to a higher court, then it will be 45%. In most cases when a case is appealed to a higher court, then the attorneys do have to a certain amount of work. And that's one of the risks that the clients take. Contingency fee contract inherently involves risks on both sides. The lawyers risk that the case may be lost, that the case may require much more time than they anticipated it would, or that the fee would be reduced. The clients run the risk that there may be circumstances where the fee is settled without much work, or the outcome is extremely high, which would give the lawyers a fee, but those risks are balanced by the parties in a contingency fee contract.

O'NEILL: So you said one circumstance would be if the contract is excessive on its face?

DEVOE: Right.

O'NEILL: Are there other circumstances where you could review it in hindsight?

DEVOE: For example, if the lawyers manipulate the facts to affect the outcome. For

example, if there were allegations that there was collusion with the other side where someone called someone and said, you know I get a higher fee if you file a notice of appeal. There is no allegation of that in this case. But if the parties are acting in that way, that may be a breach of fiduciary duty, or if the parties fail to disclose material information about the fee to the clients. And in this case there was full disclosure to the clients: We're accepting 45% because the case was appealed to a higher court. The only thing that's alleged to have been not represented to the clients is that when we do this for breach of a contract. So again, if the contract was not breached, then that disposes of that issue.

GONZALEZ: Would there have been a breach if the law firm had filed the appeal knowing that a settlement had been reached, would that have been a breach of fiduciary duty?

DEVOE: There would at least be a fact issue about that, because you have to go into the motives of the law firm. If there was no reason to do it other than generating a higher fee, then that might be.

GONZALEZ: You said it might be. Why wouldn't that be a breach of fiduciary duty if the only reason of filing the appeal was to increase the fee?

DEVOE: If that is the only reason, I said it would be. I said there might be some other reason for them filing. But there would at least be a fact issue about that.

ENOCH: This was a settlement after a judgment and the settlement was for an amount less than the judgment amount. And so if the settlement wasn't consummated within a relative short period of time, meaning money was paid and documents were signed, then the party that lost the lawsuit was going to have to appeal. They were going to have give their notice of appeal to keep that judgment from becoming final which they would lose the benefit of this settlement for less than the amount?

DEVOE: That's right.

HANKINSON: Must excessiveness of a fee always be determined on the front-end?

DEVOE: Yes it should. And that's what rule 104 says, that we analyze the unconscionability of fees, which that rule prohibits based on the circumstances that existed at the time the contract was made.

HANKINSON: But if we do that, then we eliminate the circumstance that you were just describing where for example there is collusion between the two lawyers to get a notice of appeal filed so it could trigger an additional 5%.

DEVOE: Right. And that would I said also be a breach of fiduciary duty, but not based

solely on the excessiveness of the fee, not based on the amount of the fee, but on some other independent act in connection with the fee that would cause that breach.

HANKINSON: So you're advocating a position that we should never look at whether a fee is excessive based on the services actually rendered or the subsequent course of events after the contract has been entered?

DEVOE: That's right.

HECHT: Who decides if a fee is excessive?

DEVOE: That's probably a law question for the court if there's an allegation that a contract on its face is excessive. It may be that the restatement of the rule governing the law of lawyers says that one of the relevant factors that you consider is whether it's out of line with other fees charged by other reasonable lawyers. And it may be that you would put on evidence that the typical fee is 40-45%, and this lawyer is charging...

PHILLIPS: If every lawyer in this community started charging 75%, would that set the standard?

DEVOE: According to what the restatement - well that's one of the factors that the court considers. That wouldn't necessarily be the dispositive factor but at some point if everybody is charging a fee, then charging the same fee that everybody else charges is not an unreasonable fee.

HANKINSON: So contingent fees then if the community is allowing them at a certain level would never be excessive nor would billing someone $2,000 an hour and signing that kind of an agreement as long as there were others that were doing it?

DEVOE: It would at least not be out of line with what the community standards are And again, as the restatement says, that's one of the factors that you look at. It's not the only factor, but if it's what everybody else is charging, then at least that factor is _____.

HANKINSON: How does the client's expectations fit into this? I mean if we're looking at just what the lawyers are charging, and that's what they think the market will bear, how does the client in the expectations of the clients fit into the analysis of whether or not the fee is excessive at the front-end?

DEVOE: That is certainly one of the factors that you look at. And in this case, there is no evidence about what these clients expected. And it's likely that this is not a situation where a client appreciated the difference between perfecting appeal, and filing another appeal, and all the other steps on appeal, but that they were told ahead of time that if the case is appealed, then it will be at a higher rate. And there's no evidence that they expected anything other than that.

HANKINSON: Well how does the expectation of client fit into your bright line test at the front-end?

DEVOE: I don't think it fits into the bright line test. I think if you adopt the restatement test that suggests that we ought to take this backwards looking reasonableness view, which we don't think any Texas court has taken it and I don't think they should, but if you do apply that test the restatement in addition to a number of other factors says that you ought to look at the clients' expectations?

OWEN: Let me ask you a hypothetical. Let's assume that a lawyer knows in this case that Westinghouse is about to offer an injured person $15 million in settlement, and the injured person is not represented. They run out and sign up a contingency fee agreement that provides for 40%, and the next day Westinghouse does in fact offer the $15 million in settlement not knowing even that the injured party is represented. Is the lawyer entitled to 40% of the $15 million?

DEVOE: Exactly. As you suggest Justice Owen is very similar to an example discussed in the restatement of the law governing lawyers. Section gives an illustration in a criminal case where an attorney accepts a fee of $15,000 and the next day someone else confesses to the offense and the charges are dropped. And the restatement in connection with that illustration says, under those circumstances when the lawyer has done nothing and because of some other circumstances...

OWEN: But here, the lawyer knows that the $15 million offer is coming, the injured party doesn't know. And the lawyer say, I see an opportunity to get 40% of $15 million if I go out and sign this person up. Are they entitled to the fee under those circumstances?

DEVOE: Again, it's unclear based on what the restatement says because the restatement says that if a lawyer does nothing and the charges are just dropped...

OWEN: Well they've breached a fiduciary duty the client by not saying - at the time that they sign them up - say you know I know that you are probably going to get an offer tomorrow for $15 million and I want to disclose that to you, but they don't.

DEVOE: Right. And that's one of the factors that I suggest in the bright line test, one of the other independent acts that would justify a finding of a breach of fiduciary duty.

OWEN: But under those circumstances could a court say, yes, you've breached your fiduciary duty because you had superior knowledge?

DEVOE: Yes, they could. And that's one of the instances I suggested as an exception...

OWEN: In this case wasn't there evidence that on Oct. 14, the trial counsel in this case, a plaintiff's counsel knew that a settlement offer was coming and knew that no appeal had yet been

filed, didn't tell the - basically told the other side that it was settling, and went ahead and calculated the 45% even before the appeal had been filed?

DEVOE: There's not any evidence that the trial lawyers contemplated that amount before the appeal was filed.

OWEN: Isn't there a document dated Oct. 14 with a 45% calculation?

DEVOE: There's a document by a CPA, who was hired by the Lopez' as their CPA, who did a calculation, may have done other calculations that day, but there is no evidence that the lawyer ever supplied that information or that the lawyers ever claimed to take a higher fee before the case was appealed.

ENOCH: You said the excessiveness of a fee is measured by the perspective view under the facts as known. Under Justice Owen's example, that would be an excessive fee case. That would be the lawyer knew circumstances and set a fee with that knowledge and you look at that and it's a $15 million settlement that the lawyer knew was coming down, and he just arbitrarily got agreement. That would be an excessive fee case?

DEVOE: Right.

ENOCH: The restatement, you use an example where the lawyer gets $15,000 for representing a criminal case, and the next day the case was charged and the lawyer has done nothing for that is a little bit different scenario. But it looks to me that the restatement says, that could be an excessive fee case because the result obtained without a lawyer doing any work, and therefore, the lawyer had not earned the fee the lawyer had been paid. And it says that's an excessive fee case. On a contingent fee where the lawyer takes a risk not knowing anything about the case, a settlement comes down the next day for $15 million, the lawyer didn't know it was coming down, just the lawyer saw this is a significant damage case. The plaintiff comes and says, I need representation. The lawyer says, fine, signs up for a contingent fee. The next day it settles. It seems to me that would fit within that scenario of excessive fee.

DEVOE: The answer to that falls in what the restatement says about that example in the criminal case with the $15,000. Because even though the restatement says, if the lawyer does nothing and criminal charges are dropped the next day, that might be an excessive fee. That same illustration, which is illustration 1 under comment C of §46 says, if however the prosecutor dropped the charges as the result of a plea to bargain negotiated by the lawyer the rapid disposition would not render unreasonable an otherwise proper flat fee.

ENOCH: I recognize that. I'm just saying taking the scenario of the lawyer gets $15,000, the case is dropped, the lawyer has done nothing, that's excessive fee. Contingency fee, the lawyer no imbalance of information at all. The plaintiff comes and says I've got serious injuries, the

lawyer says yes you do, takes 40% contingency, the next day $15 million is offered to the plaintiff, the plaintiff wants to take it, and the lawyer hasn't negotiated that. That's the offer that's there. Is that an excessive fee circumstance?

DEVOE: We say let's look at the contract. And under the contract that would not be.

ENOCH: Because why?

DEVOE: Because under the contract that's what the lawyer would be entitled to.

ENOCH: But the criminal case of $15,000 where the lawyer did nothing to get the charges dropped, the restatement says that's excessive fee?

DEVOE: Right. And that theory has never been adopted in this state and we're saying that in this case, you look at the contract.

ENOCH: What you're saying is because that's a retrospective view, that should not be an excessive fee case. You have to look at perspectively when they took $15,000 it was a serious case, and regardless of how it was resolved later, that cannot be an excessive fee case?

DEVOE: That's right.

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RESPONDENT

POZZA: A lawyer's fiduciary obligation is embedded in the performance of his or her contract. That is once that contract is formed and that lawyer begins representation of that client those fiduciary obligations are there and they are a part of that throughout the performance of that contract...

GONZALEZ: It seems to me that the lawyers here did a pretty good job for your client. They got a $25 million jury verdict, $15 million settlement. Now you are asking that they forfeit all of their legal fees.

POZZA: I am.

GONZALEZ: Why aren't they entitled to keep some of it?

POZZA: The reason why I think the amount should be the entire amount is because of the events that occurred in Oct. 1991, that we do look at it at a minimum from the standpoint of their fiduciary obligation. They seek a bright line here. They did not provide one. So we have this appeal to a higher court. I don't think that's a term of art. I think it's given its common meaning. Because

of that they find themselves in Oct. 1991 in this situation: the case is settled for $15 million; whether it settled before the perfection or not is not relevant to this analysis as fiduciaries though they have a contract that says an appeal to a higher court and they are there in Oct. 1991 and they are saying how are we going to split this up. They make the determination as late as Oct. 30, 1991, and you only have to look at Mr. Hockema's affidavit 59 and 60 of the clerk's record for this evidence. On Oct. 30, 1991, Mr. Hockema knows this. He knows that they have not done a lick of work on an appeal from Oct. 18 to Oct 30. He knows that the $15 million that they've gotten to the Lopez' is the same demand they made to Russell McMains on Sept. 25. They are now settling post-filing of the cash deposit, the same amount. So they have not added a penny towards what the client is going to get. And now they are looking at their contract and they are saying appeal to a higher court. By the way the appeal to a higher court you don't walk that language perfection into appeal to a higher court.

O'NEILL: How would you define "appeal to a higher court?"

POZZA: We give it is plain common meaning, and we also invoke in infect §29a of the restatement third, the law governing lawyers, which is what would be the reasonable expectation of the client. I think there is a 1971 case from the Texas SC that says, in interpreting contracts, we look at words and those words point to things. They point to external things.

HECHT: What?

POZZA: In this case they point to a higher court.

HECHT: That's what you do when you post a cash bond, you appeal to a higher court.

POZZA: I'm saying from the terms of the contract itself if you were just looking at it from certainly the expectations of the client you would see appeal to a higher court. That would point me to a higher court. That would point me to an appeal. I would go to that higher court, I would not find an appeal there. That may be overly simplistic but my opinion is that even if that's over-simplistic that's a more rational way of common sense looking at it than their version. Because they would like to tell you, they tell you, that their version is just as simple. But when you analyze it, when you sort of deconstruct it if you will...

O'NEILL: So are you saying if the rules provide it, then to perfect an appeal you would have to file a cost bond with the appeals court, your result would be different?

POZZA: Well I'm not saying that that would be the case. No, I'm not. Let's put it this way. I guess I'm saying two things depending on whether you are looking at it from a breach of contract perspectively or not. If we are saying appeal to a higher court and given it a reasonable construction, I think there has to be an appeal on a higher court.

OWEN: When would that be? When will the first moment that that would be?

POZZA: That very well may be when there's something happening in that higher court, whether it's docketed or whatever else. I'm not saying it's sufficient, but at least at that point something has happened. The problem in this case though is that they did not use a term of art when they decided what the triggering event would be. And because they did not use a term of art, there isn't that external thing that you can point to from the contract that would be a term of art. So in Oct, 1991, they had a looseness in their contract that they've got to resolve. And what I am saying is they had the obligation not to self-deal at the moment when they attempted to resolve that.

O'NEILL: If we were to determine that appeal to a higher court was met by the filing of a cost bond and there wasn't a breach of contract, does that take care of the fiduciary duty claim?

POZZA: No.

O'NEILL: Now, I believe the CA said that they were one of the same. Do you disagree with that?

POZZA: No. The court's analysis - we don't disagree with the court's results. The court's analysis was that the breach of contract also was a breach of fiduciary duty.

O'NEILL: _____ opinion to say that your breach of fiduciary duty as pled was solely to breach of contract?

POZZA: I don't think our pleadings tie it together. Certainly our briefing is tied together because we are of the opinion that the breach of contract is also a breach of fiduciary duty. But our pleadings don't restrict us that way. You'd certainly want to have a breach of fiduciary duty without having a breach of contract.

O'NEILL: Maybe my question is not clear. Didn't the CA say that, that they were one in the same, that disposition of the contract claim would satisfy the fiduciary duty claim?

POZZA: That's the way they treated it.

O'NEILL: And isn't that the basis upon which they took jurisdiction?

POZZA: That's the way they took jurisdiction. They said there was no breach of contract and because that was connected to the breach of fiduciary duty, the TC's decision that there was no breach of contract in effect disposed of everything else.

O'NEILL: And what does it do to the jurisdictional argument if we say as you say they are not tied together, what does it do to the jurisdiction final judgment _____?

POZZA: Without a severance, I'm not sure what the jurisdictional aspects would be.

O'NEILL: Aren't we in a bit of a catch-22 there. You're either tied to it or you're not. If you're not, we have a jurisdiction problem. If you are, we only dispose of the contract claim and how do you want us to decide that?

POZZA: First we are happy to be tied to it for other than _____ jurisdictional reasons that might be beneficial to us because we see that there is that connection there. If that connection is not there, then there is no question it's a jurisdictional issue.

PHILLIPS: Isn't your claim for breach of fiduciary duty barred by limitations?

POZZA: It's our belief that limitations is 4 years.

PHILLIPS: Was that settled this year or unsettled _____?

POZZA: This is sort of a separation of powers issue that I don't want to get in the middle of. The legislature has - I guess it was an act that was passed and it was a codification now of Civ. Pract. & Rem. Code and they plug into §16, fraud and breach of fiduciary duty. I think in §2 they say, well this is clarifying differences of opinion amongst the CA's. And they sort of imply we're not changing law, it's always been that way. This court might someday determine that that's not the case. But we do take the position that breach of fiduciary duty is a 4-year statute of limitations, and therefore, would not be no more applicable on that claim than on the contract claim.

HANKINSON: Under what circumstances will an attorney's fee be excessive and at what point in time in the attorney/client relationship should that determination be made?

POZZA: I believe an attorney's fee contract can be drawn in such a way that it is reasonable at the outset, and if performed in accordance with that contract, that's all you would have to look at. I'm saying that they could have drawn a contract that worked. They didn't And I guess what I am trying to make in my connection to Oct. 1991, it's because they didn't. It's because there was a looseness of the language. They should not have had a decision to make where they had to balance their interests against their client's interests in Oct. 1991. They drew that contract, they drew it that way, and it gave them that looseness...

OWEN: You say its loose. Are you saying it's ambiguous?

POZZA: I don't claim to be an expert on interpreting contracts, but when we engage in primary rules of construction there is a lot of things about interpreting those awards that one could say well we are really involved in ambiguity. We've sort of taken as a secondary position that if it is ambiguous contra proferentem, we come to the same result, because we construe it against the drawing party, especially a fiduciary.

HECHT: If it had said, by perfecting appeal under the rules of appellate procedure,

would the 5% additional fee have been unreasonable, excessive?

POZZA: I think if it had said perfecting - if it had used the term of art, filing of original petition, perfecting appeal, it would not be unreasonable.

HECHT: So you're problem is not with the 5% for not doing any work, your problem is with the trigger?

POZZA: It's not quite right and let me tell you why it's not quite right. The problem is this, the problem is because they don't use the term of art, that they are left with the ambiguity. It's because they are left with the ambiguity that fiduciary duties and obligations do come into play in their decision on how to cut that settlement up in Oct. 1991. And so I guess what I am saying is it's not just well they could have done it better, and they didn't, no harm _____. I'm not saying that whatsoever. I'm saying they drew a contract, they permitted whether we call it an ambiguity for contract purposes or something where there was enough looseness in the language where they had to interpret it. They did not necessarily have to interpret it. They drew a contract. They had to interpret. When they did that, they had to decide between their interest and their client's interest, they chose their interest and that was a violation both of the contract based on art and construction and certainly...

OWEN: Just so I am clear about this. If the language had said what Justice Hecht just said, perfecting an appeal under the rules of procedure, you would not have a breach of fiduciary argument?

POZZA: Again the facts aren't here or at least that we don't think are here about them manipulating to get to the triggering event, but in the absence of that I agree.

HECHT: If you think it's clear today, do you have a breach of fiduciary argument?

POZZA: If it's on it's face and if...

HECHT: We think that. You take the position that it's ambiguous. If we decide that it's clear, do you still make a breach of fiduciary argument that well we finally decided it but back at the time we didn't know?

POZZA: Yes.

PHILLIPS: In light of your argument, if you're right wasn't the CA's result right to limit this to the 5% additional? I guess they drew a contract and they weren't clear enough. Why should that jeopardize their entire fee or a substantial portion of it under *Burrow* to be...

POZZA: Right. There is no question we're asking that it all or a substantial part. I don't

think we've been reluctant on that. I think it goes back to the state of affairs in Oct. 1991, which are very relevant on the fiduciary obligation because of the looseness of the contract. They had a decision to make as to whether that was an appeal to a higher court based upon their fiduciary obligations and the work they had done. None. The amount that they had gotten in excess of what they were demanding earlier.

OWEN: But let's assume we say it's not ambiguous. An appeal was perfected. Do you still say there is a breach of fiduciary duty?

POZZA: Yes.

O'NEILL: Can you articulate that claim?

POZZA: If this court construes as a legal matter that perfection is an appeal to a higher court, that doesn't change the events of Oct. 1991.

GONZALEZ: Why would it have been unreasonable for the lawyers to draw the same conclusion at that point in time, just simply been mistaken?

POZZA: I think frankly even if that is the case, I think a lawyer unless they have the clarity. Now it may be that this court wishes to give it that clarity because it may mean that. But there's no question that in the contract that they drew, they don't state that. They don't use that language. So in the contract that they drew, they had to make a decision. And I think when they had to make a decision it's a different kind of decision than this court makes. Because this court is not in the fiduciary relationship with those clients. When they make that decision, I think they have to make it as fiduciaries, and if there is any sort of play in it, as there obviously is because it doesn't say perfection in the contract, they can't self-deal, which they clearly did here..

OWEN: So if you get in a fee dispute and there is reasonable arguments on both sides, but the court has to make the call as a legal matter and the client loses, the client still wins on breach of fiduciary duty because you're saying the lawyer shouldn't challenge it when there is basis for disagreement?

POZZA: No. I guess what I am saying is that if there are facts that would - the client should have the opportunity to determine whether or not there is a fiduciary violation in connection with the performance of that contract.

HECHT: The firm should have told the client: Look, we think you owe the 45 but you may only owe 40.

POZZA: Correct.

HECHT: Do you agree with petitioner's counsel that whether a fee is excessive is a question of law?

POZZA: Yes. There may be like *Burrows*, factual predicates that go into the determination, but yes.

HANKINSON: And when should that determination be made? Do we wait to see what kind of work the lawyer does? Do you determine it at the front-end and never consider the subsequent events?

POZZA: I think there has to be recognition of libertarian freedom of contract principles notwithstanding fiduciary obligations. No question about that. However, I think those fiduciary obligations are very important. And I think as embedded as they are into the performance that unlike perhaps other interpretations of contracts, I don't think you rule out nor would you just have a general rule of ruling out the evaluation of the lawyer's performance under the contract.

OWEN: Let's suppose again, the hypothetical we've talked about before that you had signed up a client for 40% contingency fee and the very day after that contract was inked Westinghouse made a $15 million offer. All that you did was sign-up the contingency agreement and have initial interview with the client. Would you say that the lawyer would breach a fiduciary duty if they accepted the 40% fee?

POZZA: Yes, in the sense of what Justice Hankinson was saying. That would be an example of why you would not preclude the client being able to say, notwithstanding the contract the performance was such that fiduciary issues are involved and they need to be evaluated. In that case, I think there would be a breach.

OWEN: What would the lawyer have to do to earn the 40% contingency fee?

POZZA: I think there has to be some causal connection that the lawyer, in your situation, I would think there would have to be some causal connection between the lawyer being hired and the amount being offered.

OWEN: Let's say the lawyer writes a demand letter but it crosses in the mail with the settlement offer?

POZZA: I don't think the causal connection is there. I mean if our friend Joe Jamil picks up the phone and says, I'm representing X, and they say $15 million, one might very well say: well it's a good causal connection. I think there has to be some connection between the representation and the result that occurs.

ENOCH: As I understand Mr. Bowe's argument he says, if your complaint is an

excessive fee complaint, then the excessive fee has to be determined at the outset of the relationship to avoid the problem that every fee dispute turns into a breach of fiduciary claim. Their argument is that you looked to the contract to see that in the event an appeal is filed, is 45% an excessive fee. Your argument seems to be that if you have a discrete triggers in the contract, then whenever the trigger is pulled, you have to look at the circumstances at the time the trigger is pulled to determine if it's an excessive fee, so that the additional 5% for the appellate work that wasn't done, as the parties were looking were not anticipating an appeal, were not anticipating a _____ appeal, this is just simply a way to keep the judgment alive so the settlement can be done. Was 5% of the recovery an excessive fee? And you argue that it was excessive if that - that's your argument. You are really not arguing that 45% is excessive. You are arguing that the 5% is excessive?

POZZA: Two things. One, I'm arguing that we can look at the circumstances present Oct. 1991. They had not earned it and they took money that they were not owed. They took money from the client for doing nothing. And I guess similarly what Justice Gonzalez had said earlier in construing the contract, I think if the contract says or can be construed for services rendered, there will be this trigger, then I think the contract itself points to looking at activity that occurred at the time of the triggering event.

ENOCH: Do you say that 45% - looking at the contract from the date it was entered into, would 45% have been - are you arguing that that's an excessive fee?

POZZA: I'm not.

HECHT: If the contract is clear but wasn't clear at the time and so there is a breach of fiduciary duty, are there any actual damages from that breach?

POZZA: In this case certainly.

HECHT: If the contract is clear, the firm is entitled to the fee? If we think the firm was entitled to fee because the trigger happened but it wasn't clear then so maybe there was a breach of fiduciary duty, are there any actual damages?

POZZA: There would be actual damages in the *Burrow v. Arce* category, I imagine.

HECHT: No actual damages but you are still seeking a forfeiture?

POZZA: Yeah. The nature of a forfeiture remedy would vary greatly if the conduct - the example you're giving me is the contract is fine, they are absolutely entitled to $750,000, they did take it, whether they guessed right or not when they made that decision Oct. 1991, whether it was luck or not, or whatever their mental frame of mind was, they are entitled to it and they took it, there could be a breach of fiduciary duty, forfeiture might be appropriate but it might be more in the *Burrow's* box, I think.

O'NEILL: Was breach of fiduciary duty - my understanding of what you are saying here today the breach of fiduciary duty is was their failure at the time the settlement is funded to reveal that there may be a dispute as to what "appeal to a higher court" means?

POZZA: I think the best evidence certainly of their breach of fiduciary duty is the events in Oct. 1991, in the fact that they should have told the client: we haven't earned this fee and here are these words "appeal to a higher court" and we are going to tell you there is an appeal.

O'NEILL: Again, the resolution of the contract issue would resolve that posing of the fiduciary question. I guess my question is separate and apart from the contract, you're saying that just by not revealing to the client that this could be disputed, is that in and of itself a breach of fiduciary duty?

POZZA: I think it is here. Where it's connected for services rendered that have not been rendered.

O'NEILL: Has that pled or argued anywhere?

POZZA: It's not been pled in the sense that we've not had any pleading over that kind of detail and that is not the way the argument or briefing is going to be.

O'NEILL: And that was not what the TC decided the summary judgment on?

POZZA: The breach of contract issue disposed of everything.

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REBUTTAL

LAWYER: I would like to start with Justice Owen's hypothetical about the very quick settlement and the variations on that theme, because for every hypothetical of a quick settlement close to the trigger, there is an equal and opposite hypothetical at the other end of the spectrum. Obviously it's a continuum and an infinite number of things can happen. But that's why we are resisting as strongly as we can the restatement illustration.

The focus seems to be misplaced in the restatement. The focus in the restatement seems to melt over into compensation for work being done, which I don't think is the right test at all. And that's why I think it's off-base for the plaintiffs to argue they did nothing. We are not being paid for doing anything. We might have done a million hours of work for 20 years, but that wouldn't alter the compensation arrangement. These contracts are not about work. They are about risks. And they are good for clients. If the hard cases fall apart when it's close to the line in the hypotheticals like Justice Owen appropriately asked, then that is a chill on the ability to negotiate this kind of deal with the client up front. Clients need these caps on how much they are going to

have to pay, whatever form it takes: flat fee; some sort of stair-step. It is good for clients and because there are hypos at this end, there are also hypos at that end. It's going to be a tradeoff.

ENOCH: In that regard, if you have a contract that triggers levels of fees, would it be inappropriate for the court to consider prospectively the excessiveness of the incremental increase in the fee when that trigger occurs? So it's 40% through trial, it's 45% in the event of an appeal. When you get to the trigger time, would it not be appropriate for the court to look at the triggering circumstances and say, you have the right to charge under your contract a fee of 5 additional percent of the recovery in the event it's appealed. But looking at it prospectively, we all know that this appeal is meaningless to the extent that we've already got an agreement and it's just a delay time to keep the judgment going. Would it not be appropriate for the court to look at the discrete triggers to determine whether the trigger is excessive?

LAWYER: When you say prospective, you're actually saying sort in the middle of things: after the trial but before the appeal.

ENOCH: In the event that the trigger that would entitle additional fees that would not otherwise be entitled?

LAWYER; It would be inappropriate to judge it at that point in time after we know what the judgment is and before we know what's happening on appeal unless the lawyer's negotiating the appellate fees at that time. For example, we don't do trial work. If the clients had come to us at that point and said, we have a judgment in hand would you negotiate a fee with us to defend the case against Rusty on the other side when Westinghouse appeals, then it would be appropriate to judge our contract that way. But remember this 5% stair-step that we are going to judge was signed 2-years before, before the trial and before the case had even been field. So that is the only point in time where you can judge it. And I think that's what *Archer v. Griffith* pretty much nails down.

OWEN: So you're saying on an appeal for example, if they come to you and say we'll give you 15% of anything that we win to handle the appeal, and the trial counsel doesn't know you have been retained and that same day they offer $15 million and the case is settled and you don't do a lick of work, under your theory you are still entitled to the 15% because you were hired as appellate counsel?

LAWYER: I think that's right subject to ordinary policing of contracts, escapes for fraud, overreaching, duress, mutual mistake.

OWEN: There was no collusion on your part. It's just that's the way it...

LAWYER: Right. If I'm taking a risk...

OWEN: What's your risk under that scenario. Let's say there's been a judgment in a

plaintiff's failure and they are concerned that Westinghouse is going to appeal and they want to hire you on appeal. The plaintiff comes to you and says, I will give you another 15% if I prevail, if I keep my judgment and if you will represent me on appeal. And you say fine, and you sign the document. That same day Westinghouse doesn't know you've been hired as appellate counsel. They telephone trial counsel and offer the plaintiff $15 million, the plaintiff accepts it, so you never do any work. Where is your risk in that scenario?

LAWYER: My risk is that settlement doesn't go through, Westinghouse doesn't offer that. If when the client signs up with me I have a risk of having to fight Rusty for several years through the courts, then I have taken the risk. Now 15% may be too high. And if that's out of bounds, we police that and say that's just too much. But we do it because it was too high at the moment of the case being signed up. The fact that the case settles the next day, I can't find a principal stopping point if one day is the stopping point, and if that's too much, I don't know where to draw the line. To me the questions is, what is the risk at the moment I negotiate as an arms-length matter with that prospective client.

HECHT: But it could be excessive on that day?

LAWYER: Absolutely.

OWEN: Just because of the amount?

LAWYER: Absolutely. If I said, you paid your trial lawyers 40%, pay me another 40% for the appeal, as a matter of law that's going to be too much.

PHILLIPS: Where is this matter of law?

LAWYER: I'm saying it would be a matter of law if I charge...

PHILLIPS: 80 is and 45 isn't. So it's somewhere in-between there is this difficult line if you're co-counsel...

LAWYER: It is between there. I don't know where I would make that call if I were a trial judge. But that's no different from avoidance devices for contract law generally. We have avoidance devices for unconscionability generally.

O'NEILL: I would like for you to answer my question.

LAWYER: You asked about confusion of contract of fiduciary duty and they are the same here. Page 12, of the other side's brief says that the conduct which gives rise to the breach of contract is the same conduct which constitutes a violation of the fiduciary duty. That's why they moved to sever. They didn't just move for partial summary judgment on contract and fiduciary duty. They

moved for summary judgment on those two claims and moved to sever them out and said they are separate from the other claims in the case.