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John M. Bjorkman

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**MINNESOTA AND THE AMERICAN RULE:
THE RECOVERABILITY OF ATTORNEYS' FEES
FOLLOWING *IN RE SILICONE IMPLANT INSURANCE
COVERAGE LITIGATION***

John M. Bjorkman[†]

I.	INTRODUCTION	541
II.	THE AMERICAN RULE	542
III.	THE AMERICAN RULE: A MINNESOTA PERSPECTIVE	543
IV.	THE <i>MORRISON</i> EXCEPTION.....	546
V.	SETTING THE STAGE FOR 3M: BLURRING OF THE <i>MORRISON</i> EXCEPTION.....	549
VI.	<i>IN RE SILICONE IMPLANT INSURANCE COVERAGE LITIGATION</i>	551
VII.	RATIONALE FOR LIMITING THE <i>MORRISON</i> EXCEPTION	554
VIII.	CONCLUSION.....	555

I. INTRODUCTION

In the United States, a successful litigant is generally not entitled to recover attorneys' fees from the opposing party absent specific statutory or contractual authorization. This basic principle is commonly referred to as the American Rule. Minnesota recognized and adopted the American Rule roughly 125 years ago. A limited number of exceptions to this longstanding rule exist, but Minnesota courts have generally been reluctant to expand or add to these exceptions. In Minnesota, an

[†] John M. Bjorkman is a partner at the law firm of Rider Bennett, LLP in Minneapolis, Minnesota. Mr. Bjorkman is a graduate of the University of Michigan, and he graduated, Order of the Coif, from the University of North Dakota School of Law. Mr. Bjorkman's practice is focused on insurance coverage litigation, and he is chair-elect of the American Bar Association's Tort Trial & Insurance Practice Section's Insurance Coverage Litigation Committee. The views expressed in this article are those of the author and not the clients he represents.

exception to the American Rule exists for fees incurred in a declaratory action to establish insurance coverage but only if the insurer has breached its duty to defend.

The Minnesota Supreme Court created this exception almost forty years ago, and there have been numerous attempts to expand it, including the recent attempt by 3M and its amicus allies, the Commissioner of Commerce and the Minnesota Trial Lawyers Association. The Minnesota Supreme Court rejected this most recent attempt to expand the *Morrison* exception to the American Rule in *In re Silicone Implant Insurance Coverage Litigation*¹ and reaffirmed that attorneys' fees are recoverable in a declaratory judgment action only when the insurer breaches its contract with the insured by refusing to defend. This article will outline the historical underpinnings of the American Rule and its development under Minnesota law. It will also analyze the *Morrison* exception and the import of the Minnesota Supreme Court's adherence to the narrow exception to the American Rule it carved out roughly four decades ago.

II. THE AMERICAN RULE

The American Rule can be traced back to the formation of the United States.² The American Rule represents the basic proposition that a losing litigant generally has no obligation to pay the prevailing party's legal fees.³ A number of factors likely contributed to the American legal system's departure from the loser-pays approach followed under English law.⁴ Perhaps the most commonly cited explanation for development of the American Rule is the belief that a contrary rule would stifle access to the judicial system because of the threat that attorneys' fees might be awarded to the prevailing party.⁵

The American Rule has withstood numerous challenges, and courts in the United States have steadfastly refused to adopt a "loser-pays" approach with respect to an adversary's attorneys' fees. In *Alyeska*

1. 667 N.W.2d 405 (Minn. 2003).

2. See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1570-77 (1993) (discussing the early development of the American Rule).

3. See *Day v. Woodworth*, 54 U.S. 363 (1851); *Arcambel v. Wiseman*, 3 U.S. 306 (1796) (stating that the general practice of the United States is against allowing recovery of attorneys' fees as damages).

4. See Vargo, *supra* note 2, at 1570-77.

5. *Id.*

Pipeline Service Co. v. Wilderness Society,⁶ the United States Supreme Court outlined the historical underpinnings of the American Rule and refused to depart from it. In particular, the Court noted:

We do not purport to assess the merits or demerits of the “American Rule” with respect to the allowance of attorneys’ fees. It has been criticized in recent years, and courts have been urged to find exceptions to it. . . . But the rule followed in our courts with respect to attorneys’ fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature’s province by redistributing litigation costs⁷

More contemporary explanations for the development and continued adherence to the American Rule are that the uncertainties of litigation do not warrant penalizing an unsuccessful litigant with the burden of paying the prevailing party’s legal fees and that litigation over those fees would place an undue burden on the judicial system.⁸

III. THE AMERICAN RULE: A MINNESOTA PERSPECTIVE

The Minnesota Supreme Court recognized the American Rule more than 125 years ago.⁹ In 1874, the Minnesota Supreme Court in *Kelly v. Rogers* held that a successful plaintiff was not entitled to recover attorneys’ fees incurred in proving he had been defrauded by the defendant.¹⁰ The court reasoned:

It is perfectly well settled that the fees of attorneys and counsel, and other expenses of the litigation, beyond legal costs, cannot be recovered by the plaintiff in any actions of contract, or in those actions of tort in which punitive damages are not allowed; for, *first*, these expenses are not the legitimate consequence of the tort or breach of contract complained of; *second*, to allow these expenses to the plaintiff, which are never allowed to a successful defendant, would give the former an unfair advantage in the contest; and, *third*, where, as in this state, it is provided by statute that “the prevailing party may be allowed certain sums, termed costs, by way of indemnity for his expenses in the action,” it is not in the power of courts or

6. 421 U.S. 240 (1975).

7. *Id.* at 270.

8. *See* *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *Vargo*, *supra* note 2, at 1635.

9. *Kelly v. Rogers*, 21 Minn. 146 (1874).

10. *Id.* at 152-53.

juries to increase the allowance fixed by statute, however inadequate that allowance may be.¹¹

Three years later, the Minnesota Supreme Court applied the American Rule in *Frost v. Jordan*,¹² a contract action, and held that the prevailing defendant was not entitled to recover attorneys' fees.¹³ In doing so, the court recognized the unfairness and abuse that would result from a contrary rule. In particular, the court noted:

There is no fixed standard of the value of attorney's fees. Some counsel charge more than others for the same services, and some clients will pay more than others; and when both client and counsel know that the fees are to be paid by the other party there is a great danger of abuse. In the next place, it is against the analogies of the law to allow expenses of litigation beyond the costs allowed by statute, which, as said before, however inadequate, are the measure of indemnity which the law provides. In actions of contract and of tort, in which punitive damages are not allowable, it is uniformly held that attorney's fees cannot be recovered. This is also the prevailing and better opinion, even as to actions in tort, where exemplary damages are allowable. Of course, we do not overlook the distinction between such cases and one like the present, which is on the contract of the bond; but the analogy consists in the fact that many of the reasons for the rule in the first are equally applicable to the second. In the third place, to allow attorney's fees would give the defendant in the attachment suit an unfair advantage over the plaintiff.¹⁴

In 1924, the Minnesota Supreme Court recognized what is often referred to as the third-party exception to the American Rule. In *Bergquist v. Kreidler*,¹⁵ the plaintiff purchased a building from Elizabeth Kreidler based upon a representation that a tenant's lease of the premises was expiring shortly and that the plaintiff would be entitled to full possession of the property upon completion of the purchase.¹⁶ In reality, the lease did not expire for two years, and the plaintiff was forced to bring suit against the tenant in an effort to remove him.¹⁷ That litigation ultimately failed, and the plaintiff then commenced suit against the

11. *Id.* (quoting *Day v. Woodworth*, 54 U.S. 363 (1851)).

12. 37 Minn. 544, 36 N.W. 713 (1887).

13. *Id.* at 547, 36 N.W. at 715.

14. *Id.* at 546, 36 N.W. at 714 (citation omitted).

15. 158 Minn. 127, 196 N.W. 964 (1924).

16. *Id.* at 128 196 N.W. at 964.

17. *Id.* at 128-29, 196 N.W. at 964-65.

seller's son.¹⁸ In that action, the court held the fees incurred in the prior suit against the tenant were damages and were recoverable from the seller's son because of his misrepresentation.¹⁹ In essence, the court held that the defendant's wrongful conduct had thrust the plaintiff into litigation with a third party.²⁰ Notably, the fees incurred in litigation against the son were not recoverable.²¹ In carving out this exception to the American Rule, the court made clear its decision was "limited to the facts of this case, and that it is not intended to hold that in all cases the expense of litigation following torts or breaches of contract is recoverable."²²

In subsequent decisions, the Minnesota Supreme Court recognized the limited applicability of the third-party exception and continued to adhere to the American Rule. For instance, in *Stickney v. Goward*,²³ the court reasoned that if it allowed a prevailing party to recover attorneys' fees, "no lawsuit would see the end, for immediately upon the entry of judgment therein the winner could start an action against the loser for the attorneys' fees paid in obtaining the judgment."²⁴ The court again recognized the unfairness of any other rule and commented, "where a defendant prevails in the ordinary tort action, no attorneys' fees are allowed him except as included in the statutory costs, and . . . equal justice forbids treating a plaintiff more generously than a defendant."²⁵

In *Smith v. Chaffee*,²⁶ the court recognized that "there are statutory provisions for allowing attorneys' fees to the successful party in certain kinds of actions."²⁷ Absent such statutory provisions:

The general rule is that a plaintiff, or a defendant, who succeeds in a lawsuit and is awarded and receives the statutory costs and disbursements taxable therein, has no further claim against his adversary for attorney's fees or expenses incurred in the suit. Whether the action sounds in contract or in tort makes no difference.²⁸

18. *Id.* at 129, 196 N.W. at 965.

19. *Id.* at 129, 196 N.W. at 965.

20. *Id.* at 132-33, 196 N.W. at 966.

21. *See id.*

22. *Id.* at 133, 196 N.W. at 966.

23. 161 Minn. 457, 201 N.W. 630 (1925).

24. *Id.* at 459, 201 N.W. at 631.

25. *Id.*

26. 181 Minn. 322, 232 N.W. 515 (1930).

27. *Id.* at 324, 232 N.W. at 516.

28. *Id.*

In *Dworsky v. Vermes Credit Jewelry, Inc.*,²⁹ the court again addressed the third-party exception to the American Rule. The court recognized that legal fees are ordinarily not recoverable as damages, “[b]ut where the wrongful act of the defendant thrusts the plaintiff into litigation with a third person, the plaintiff may recover from the defendant the expenses incurred in conducting the litigation against the third party, including attorneys’ fees.”³⁰ This holding is not inconsistent with the American Rule. It is not a “loser-pays” rule, but merely recognition that legal fees can, under certain narrowly defined circumstances, be an item of damage. In this regard, it is even arguably misleading to characterize this rule as an exception to the American Rule.

IV. THE *MORRISON* EXCEPTION

In Minnesota, the first and only significant departure from the American Rule occurred in 1966. In *Morrison v. Swenson*,³¹ the insured purchased an automobile liability policy. The policy was canceled because a premium increase was not paid.³² The agent misled the insured into believing the policy had been reinstated.³³ An accident occurred, and the insurer refused to defend.³⁴ The insured subsequently prevailed in establishing the insurer was bound by the representations of the agent and that coverage was available.³⁵ The court held the insured was entitled to recover fees incurred in the declaratory action.³⁶ In doing so, the court seemingly abandoned 100 years of case law with little or no comment:

The only other question remaining is whether it was proper for the court to permit plaintiff to recover his legal fees incurred in the declaratory judgment action, although the general rule is that legal fees are ordinarily not recoverable unless there is statutory authority for it.

However, this action is in the nature of an action to recover damages for breach of contract. Legal fees incurred in the

29. 244 Minn. 62, 69 N.W.2d 118 (1955).

30. *Id.* at 70, 69 N.W.2d at 124.

31. 274 Minn. 127, 142 N.W.2d 640 (1966).

32. *Id.* at 131, 142 N.W.2d at 643.

33. *Id.* at 132, 142 N.W.2d at 644.

34. *Id.*

35. *Id.* at 137, 142 N.W.2d at 647.

36. *Id.* at 138, 142 N.W.2d at 647.

declaratory judgment action were damages arising directly as the result of the breach. We think that the injured party in an action of this kind ought to be permitted to recover whatever expenses he has been compelled to incur in asserting his rights, as a direct loss incident to the breach of contract.³⁷

The above passage is the sum and substance of the court's holding on the fee issue and seems to imply that fees were recoverable as damages flowing from a breach of contract. Shortly after *Morrison*, however, the court demonstrated just how limited its ruling was, and dispelled any notion that any breach of contract could give rise to an award of attorneys' fees by making it clear that a breach of the duty to defend was required.³⁸

Case law immediately following *Morrison* demonstrates that the court recognized just how far it had strayed from the American Rule and clearly shows an effort by the court to limit the scope and potential impact of such a departure. For instance, in *Abbey v. Farmers Insurance Exchange*, the court indicated that in *Morrison*, it was actually applying the third-party exception to the American Rule, not creating a new exception.³⁹ In particular, the court noted:

While in *Morrison* we held, as an exception to the general rule, that a party who is thrust into litigation with a third person by reason of a wrongful act of another in breach of contract may recover attorneys' fees incurred in such prior litigation in an action against the one who committed such wrongful act, this court again later affirmed the general rule that attorneys' fees are allowed only when authorized by statute or provided for in the contract.⁴⁰

Contrary to the court's characterization, *Morrison* was not simply the court's application of the third-party exception to the American Rule

37. *Id.* at 138, 142 N.W.2d at 647 (citations omitted).

38. See *Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 366, 150 N.W.2d 233, 236 (1967) (limiting recovery to situations involving a breach of contract action between insurer and insured); *Abbey v. Farmers Ins. Exch.*, 281 Minn. 113, 119, 160 N.W.2d 709, 712 (1968) (denying recovery of attorneys' fees because wrongful refusal to pay disability benefits does not entitle insured to recover attorneys' fees); *Rent-A-Scooter, Inc. v. Universal Underwriters Ins. Co.*, 285 Minn. 264, 168-69, 173 N.W.2d 9, 11-12 (1969) (limiting recovery of attorneys' fees to actions where the insurer erroneously denies its obligation to defend); *Olsen v. Preferred Risk Mut. Ins. Co.*, 284 Minn. 498, 507-08, 170 N.W.2d 581, 587 (1969) (denying recovery of attorneys' fees not resulting from a breach of contract).

39. 281 Minn. 113, 119, 160 N.W.2d 709, 712 (1968).

40. *Id.* at 119, 160 N.W.2d at 711.

because the court permitted the recovery of fees incurred in the prior litigation against the third party, as well as the fees incurred in the current litigation against the insurer. The *Abbey* decision does, however, demonstrate the court was not entirely comfortable with the inroad on the American Rule it had created just two years earlier, nor was it willing to expand that inroad further.

The court's unwillingness to expand *Morrison* was again evident in *Rent-A-Scooter, Inc. v. Universal Underwriters Insurance Co.*⁴¹ In *Rent-A-Scooter*, the court, again, specifically limited its holding in *Morrison*.⁴² In fact, the court's ruling makes it clear that *Morrison* does not stand for the proposition that fees are recoverable in a declaratory action, even where the insurer has breached its obligation to defend, unless the insured has actually been thrust into litigation and forced to defend itself.⁴³ In *Rent-A-Scooter*, the insurer denied coverage and refused to defend; however, the insured chose not to defend himself and, instead, allowed a default judgment to be entered.⁴⁴ In refusing to allow the insured to recover attorneys' fees, the court held:

We hold that when an insured is compelled to defend himself in an action because his insurer has erroneously denied its obligation to defend him under its liability policy, the attorneys' fees incurred in the defense of that action may be awarded the insured as contract damages in a subsequent action against the insurer; but, absent statutory authority or specific provision in the insurance contract itself, the insured may not recover attorneys' fees in an action against the insurer to establish coverage under an insurance policy. Because the plaintiff interposed no defense in the action against him, permitting the issue to be decided by default, there is no basis for an award to him of attorneys' fees.⁴⁵

To the extent the *Morrison* decision may have implied that a breach of contract by an insurer gives rise to the right to recover attorneys' fees, careful examination of the facts in *Morrison*, as well as subsequent decisions of the court, make it very clear just how narrow an exception to the American Rule the court had created. In fact, at least one court concluded these subsequent decisions effectively overruled *Morrison*.⁴⁶

41. 285 Minn. 264, 173 N.W.2d 9 (1969).

42. *See id.* at 268-69, 173 N.W.2d at 11-12.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See W. Cas. & Sur. Co. v. Polar Panel Co.*, 457 F.2d 957, 962 (8th Cir. 1972)

Although *Morrison* has survived as a limited exception to the American Rule, it clearly did not and does not stand for the proposition that a breach of contract gives rise to the right to recover attorneys' fees. Instead, only a breach of the duty to defend that actually thrusts the insured into litigation and forces the insured to incur defense costs that he or she would not otherwise have incurred is sufficient to invoke the *Morrison* exception. This is a significant distinction.

V. SETTING THE STAGE FOR 3M: BLURRING OF THE *MORRISON* EXCEPTION

The significant distinction between the type of breach needed to invoke the *Morrison* exception and any other breach of contract still exists in Minnesota. Dicta in more recent case law has made this distinction less apparent. This blurring of what was initially a very bright line gave rise to the fee dispute between 3M and its insurers. An examination of recent case law highlights why the Minnesota Supreme Court was required to address an issue it had seemingly resolved many times before.

Following *Rent-A-Scooter*, the Minnesota Supreme Court next addressed the recoverability of attorneys' fees in a declaratory action in *Lanoue v. Firemans' Fund American Insurance Cos.*⁴⁷ The court rejected the Eighth Circuit's conclusion that *Morrison* had been overruled and attempted to again demonstrate the narrow scope of the *Morrison* exception.⁴⁸ In analyzing *Rent-A-Scooter* and *Abbey*, the court noted, "This court has resisted efforts to expand the *Morrison* holding to allow collection of attorneys' fees where the insured is seeking only payments under the insurance coverage."⁴⁹ In dicta, the *Lanoue* court noted that "*Morrison* stands for the proposition that, where an insurance contract is intended to relieve the insured of the financial burden of litigation, the insured will not be required to pay the litigation costs of forcing the insurer to assume that burden."⁵⁰ This proposition was later rejected,⁵¹ but it did spawn further imprecision in subsequent rulings.

("The holding of the court in *Rent-A-Scooter* seems to clearly overrule the earlier *Morrison* decision.")

47. 278 N.W.2d 49 (Minn. 1979).

48. *See id.* at 54-55.

49. *Id.* at 55.

50. *Id.* at 54.

51. *Am. Standard Ins. Co. v. Le*, 551 N.W.2d 923, 928 (Minn. 1996).

For instance, in *SCSC Corp. v. Allied Mutual Insurance Co.*,⁵² the supreme court allowed the recovery of fees in a declaratory action where the insurer breached its duty to defend.⁵³ The court cited *Lanoue* and *Morrison* as support for its conclusion.⁵⁴ In doing so, however, the court, again in dicta, commented, “Attorney fees are recoverable in a declaratory judgment action only if there is a breach of a contractual duty, or statutory authority exists to support such recovery.”⁵⁵ Of course, the only contractual duty that any court had ever found gave rise to the right to recover attorneys’ fees was a breach of the duty to defend.

Similarly, in *American Standard Insurance Co. v. Le*,⁵⁶ the court addressed the issue of the recoverability of fees and, again, reiterated that *Morrison* was intended to be a very narrow exception to the American Rule.⁵⁷ The court clearly intended to limit the *Morrison* exception to breaches of the duty to defend, and it noted, “with a single exception, this court has consistently resisted efforts to expand the *Morrison* holding to allow collection of attorney fees in actions which do not involve the insurer’s breach of contract by failure to assume the duty to defend.”⁵⁸

The single exception referenced by the court in *Le* was *Economy Fire & Casualty Co. v. Iverson*,⁵⁹ which the *Le* court overruled to the extent it was, or could be interpreted to be, inconsistent with *Morrison*.⁶⁰ The court also expressly overruled *Lanoue* and any other cases to the extent those cases could be interpreted as inconsistent with *Morrison*.⁶¹ Notwithstanding the court’s clear intent of limiting the *Morrison* exception, it was again imprecise in describing the basis for its holding. In particular, the court commented, “The insured is not entitled to recover attorney fees incurred in maintaining or defending a declaratory action to determine the question of coverage unless the insurer has breached the insurance contract in some respect—usually by wrongfully refusing to defend the insured.”⁶²

52. 536 N.W.2d 305 (Minn. 1995).

53. *Id.* at 319.

54. *Id.*

55. *Id.*

56. 551 N.W.2d 923 (Minn. 1996).

57. *Id.* at 927-28.

58. *Id.* at 926.

59. 445 N.W.2d 824 (Minn. 1989).

60. *Am. Standard Ins. Co. v. Le*, 551 N.W.2d 923, 927-28 (Minn. 1996).

61. *Id.*

62. *Id.* at 927.

VI. *IN RE SILICONE IMPLANT INSURANCE COVERAGE LITIGATION*

In *In re Silicone Implant Insurance Coverage Litigation*,⁶³ 3M sought coverage from its excess insurers for losses it sustained as a result of personal injury suits brought by claimants stemming from 3M's sale of silicone gel breast implants.⁶⁴ The insurance coverage litigation involved a number of substantive coverage issues, including whether 3M was entitled to recover attorneys' fees and costs it incurred in pursuing the declaratory action against its insurers.⁶⁵ Notably, none of the excess insurers had a duty to defend 3M and instead were only obligated to reimburse defense costs incurred by 3M if, in fact, coverage under the insurers' policies were triggered.⁶⁶

With respect to the attorneys' fee issue, the district court awarded fees and costs to 3M based upon its finding that the insurers had breached the covenant of good faith and fair dealing in responding to the personal injury claims against 3M and its efforts to obtain coverage.⁶⁷ The district court concluded that this breach fell within the *Morrison* exception to the American Rule and reasoned:

The Insurers did not deal fairly with 3M. Under such circumstances an award of attorneys' fees is appropriate, is within the reasoning expressed in the duty to defend cases, and is required as a practical matter if commercial general liability insurance is to work in a coherent manner in litigious modern industrial society and economy.⁶⁸

The court of appeals reversed the district court's ruling on the attorneys' fee issue.⁶⁹ In doing so, the court of appeals concluded that the *Morrison* exception is limited to situations involving an insurer's breach of the duty to defend.⁷⁰ 3M and the insurers petitioned the Minnesota Supreme Court for further review.⁷¹ The supreme court accepted review of several issues, including whether attorneys' fees were recoverable. The Commissioner of Commerce and the Minnesota Trial Lawyers Association (MTLA) both submitted amicus briefs to the

63. 667 N.W.2d 405 (Minn. 2003).

64. *Id.* at 408.

65. *Id.* at 409.

66. *Id.*

67. *Id.*

68. *Id.* at 423.

69. *In re Silicone Implant Ins. Coverage Litig.*, 652 N.W.2d 46 (Minn. Ct. App. 2002) *rev'd on other grounds*, 667 N.W.2d 405 (Minn. 2003).

70. *Id.* at 73.

71. *In re Silicon Implant*, 667 N.W.2d at 413.

supreme court and argued that an award of fees was proper.⁷²

3M and the Commissioner of Commerce, as an amici, argued that an award of attorneys' fees was proper based upon the assertion that the duty to pay defense costs is the functional equivalent of the duty to defend, and that a breach of either duty should give rise to an award of fees.⁷³ 3M also argued that *Le* permitted recovery of fees for any breach of contract, not simply a breach of the duty to defend.⁷⁴ The supreme court affirmed the court of appeals' ruling with respect to attorneys' fees and held fees were recoverable only when an insurer breaches its duty to defend.⁷⁵ The court expressly rejected 3M's argument that the court's holding in *Le* implied a breach, other than a breach of the duty to defend, could give rise to an award of attorneys' fees.⁷⁶ Furthermore, the court refused to equate a breach of the duty to reimburse defense costs with a breach of the duty to defend.⁷⁷ In doing so, the court noted, "if an insurer breaches its duty to defend, the insured must do twice what it contracted to avoid: hire attorneys and manage a lawsuit for both the underlying case and the declaratory proceeding."⁷⁸ Conversely, in the reimbursement situation, an insured, such as 3M, often has specifically contracted to retain the right to hire attorneys and control the underlying litigation against it.

The supreme court correctly concluded that the duty to pay defense costs is not the functional equivalent of the duty to defend.⁷⁹ A breach of the duty to defend requires the insured to defend itself. The insured is thrust into litigation and forced to handle issues it contractually tried to avoid, such as selecting an attorney, administering the claim, and making settlement decisions. On the other hand, the duty to reimburse defense costs is much more akin to the duty to indemnify because both involve only the insurer's duty to pay money. The supreme court previously held that when the breach of contract is limited to a breach of a duty to pay, attorneys' fees incurred by the insured in forcing the insurer to make that payment are not recoverable.⁸⁰ Where the policy merely requires

72. *Id.* at 408.

73. *See id.* at 424.

74. *See id.*

75. *Id.* at 425.

76. *Id.* at 424-25.

77. *Id.* at 425.

78. *Id.*

79. *See id.* at 424.

80. *See, e.g.,* Garrick v. Northland Ins. Co., 469 N.W.2d 709 (Minn. 1991); Rent-A-Scooter, Inc. v. Universal Underwriters Ins. Co., 285 Minn. 264, 268-69, 173 N.W.2d

reimbursement of defense costs, the insured, in defending itself, is not being asked to do anything more than it contractually agreed to do. Consequently, the rationale for the *Morrison* exception to the American Rule is not present.

The MTLA urged the court to allow a recovery of attorneys' fees on the ground that attorneys' fees are an element of damage caused by a "bad-faith" breach of contract.⁸¹ The MTLA further urged the court to overturn the long line of Minnesota cases that recognize a bad-faith breach of contract does not give rise to extra-contractual damages.⁸² According to the MTLA, much has changed, and "this country has come a long way" since the court first recognized that a "bad-faith" breach of contract does not give rise to extra-contractual damages less than twenty-five years ago.⁸³ In reaching the conclusion attorneys' fees were not recoverable, the court did not directly address the MTLA's assertions, but it did rely upon Minnesota common law that "each party bears [its] own attorney fees in absence of statutory or contractual exception."⁸⁴ The court also rejected the assertion that fees were recoverable as damages flowing from breach of the implied covenant of good faith since 3M failed to establish that any damages flowed directly from the breach.⁸⁵ Finally, the court acknowledged the limited exception it created in *Morrison* and, again, reaffirmed its unwillingness to expand that exception.⁸⁶

The MTLA's position that fees were recoverable as damages obviously ignores the American Rule. In addition, in a third-party case, a policyholder faced with a recalcitrant insurer is not, as the MTLA suggested, left without protection for "bad faith" breaches of contract. In third-party insurance cases, Minnesota already provides policyholders with distinct advantages over insurers. The rules of policy interpretation

9, 11-12 (1969).

81. Brief of Amicus Curiae Minnesota Trial Lawyers Association at 8, In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405 (Minn. 2003).

82. *Id.* See *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 237 (Minn. 1986); *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297, 309 (Minn. 1980); *Haagenson v. Nat'l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652 (Minn. 1979); *Olson v. Rugloski*, 277 N.W.2d 385, 387-88 (Minn. 1979); *Wild v. Rarig*, 302 Minn. 419, 440-41, 234 N.W.2d 775, 789-90 (1975).

83. Brief of Amicus Curiae Minnesota Trial Lawyers Association at 6, In re Silicone Implant Ins. Coverage Litig.

84. In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405, 422 (Minn. 2003) (quoting *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2002)).

85. *Id.* at 423.

86. *Id.* at 424-25.

and construction strongly favor policyholders.⁸⁷ In addition, a wrongful denial of coverage, or even a reservation of rights under certain circumstances, gives the policyholder the option to avoid all personal liability and enter a confessed judgment that is enforceable only against the insurer.⁸⁸ Further, an insurer that acts in bad faith and refuses to settle a claim within its policy limits subjects itself to extra-contractual damages.⁸⁹ Given the alternative protections afforded to insureds, there was simply no compelling reason for the court to ignore not only the American Rule but decades of Minnesota case law refusing to recognize a claim for bad faith breach of contract.

VII. RATIONALE FOR LIMITING THE *MORRISON* EXCEPTION

The Minnesota Supreme Court's refusal to expand the *Morrison* exception was sound. A contrary rule completely disregards the American Rule with respect to its application to contractual disputes and would have flooded the court system with legal fee disputes. The first wave of litigation would involve parties attempting to gain special exemption status. If any breach of an insurance contract is sufficient to give rise to the right to recover legal fees, why should the rule be limited to insurance contracts, and if allowed for breach of any contract, then why only contracts? For instance, why should an individual who has been injured by a wrongful act and been forced to sue to seek compensation for those injuries be precluded from recovering legal fees necessitated by that wrongful act? The answer in this state for more than 125 years has been the American Rule.⁹⁰

Once the initial litigation creating and identifying those classes of claimants entitled to exemption from the American Rule was complete, the court system would next be forced to deal with the reality that every case falling within one of those special status categories will involve a claim for attorneys' fees. The supreme court recognized long ago that allowing a party to recover attorneys' fees gives that party an unfair litigation advantage over his or her opponent.⁹¹ No litigant will give up

87. See *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989) ("Any ambiguity in the insurance contract must be construed in favor of the insured."); *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 276 (Minn. 1985) ("Exclusions in insurance contracts are read narrowly against the insurer.").

88. See *Miller v. Shugart*, 316 N.W.2d 729, 732 (Minn. 1982).

89. See *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983).

90. *Id.* at 713-14.

91. See *Stickney v. Goward*, 161 Minn. 457, 458, 201 N.W.2d 630, 630 (1925);

the advantage provided by the existence of such a claim. In addition, if the court had permitted the recovery of fees for a breach of the implied covenant of good faith and fair dealing, every declaratory action would have become a battleground over that issue. The existence of a claim for “bad faith” is, unlike the majority of coverage disputes, highly factual in nature, requiring extensive discovery and, ultimately, resolution by a jury. This fact would undeniably complicate insurance coverage cases by increasing discovery burdens, delaying resolution, and creating a morass of attorney-client privilege issues.

Finally, expansion of the *Morrison* exception would force the court system to deal with disputes over the reasonableness and necessity of the legal fees incurred by the prevailing party.⁹² Courts have also recognized that litigating these types of issues creates undue burdens on the court system.⁹³ As the Minnesota Supreme Court noted more than seventy-five years ago, if the court were to permit the recovery of fees, “no lawsuit would see the end.”⁹⁴

A rule requiring a breach of the duty to defend at least has the benefit of establishing a bright line. This bright-line rule is less likely to lead to ancillary disputes. Moreover, a bright-line rule requiring a breach of the duty to defend distinguishes insurance contracts from other types of contracts. As the Minnesota Supreme Court recognized over a decade ago in addressing another attempt to expand the *Morrison* exception, “If the change in Minnesota’s historical doctrine is to be made, it seems to us that this argument ought to be directed to the legislature.”⁹⁵

VIII. CONCLUSION

The *Morrison* decision was Minnesota’s first and only significant departure from the American Rule. The rationale for such a departure is not readily apparent from the *Morrison* decision itself. The *Morrison*

Frost v. Jordan, 37 Minn. 544, 546, 36 N.W. 713, 714 (1887); Kelly v. Rogers, 21 Minn. 146, 152-53 (1874).

92. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (“the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney’s [sic] fees would pose substantial burdens for judicial administration”).

93. See *F.D. Rich Co. v. United States*, 417 U.S. 116, 129 (1974) (permitting recovery of fees gives “us pause even though courts have regularly engaged in that endeavor in the many contexts where fee shifting is mandated by statute, policy, or contract”); *Fleischmann*, 386 U.S. at 718.

94. *Stickney*, 161 Minn. at 459, 201 N.W. at 631.

95. *Garrick v. Northland Insurance Co.*, 469 N.W.2d 709, 714 (Minn. 1991).

exception to the American Rule has, however, survived and, despite repeated attempts, has never been expanded. The *Morrison* decision and the Minnesota Supreme Court's subsequent application and interpretation of that decision demonstrate quite clearly that the exception created is a very limited exception. The court's decision in *In re Silicone Implant Insurance Coverage Litigation* reaffirms the narrow scope of the *Morrison* exception and, perhaps, finally puts to rest further attempts to expand that exception. While an exception to the American Rule for a breach of the duty to defend has questionable historical roots, it at least has the virtue of fixing a bright line that will not unduly complicate future litigation with ancillary issues.