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Insurance Law—Statements of Good Health

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the Court ordered a new trial, this case would conclusively answer those who ask whether the presumption has the same force in a suit for double indemnity[11] and have the effect of overruling cases which indicate that the presumption's only purpose is to assist the plaintiff in establishing a prima facie case.[12]

In this writer's opinion, the Court has gone too far in applying the presumption as outlined in the *Wellisch* case to this kind of an action. Doubtless the Court was influenced by the social opprobrium resulting from a decision implying suicide, but when the Court indicates that the jury should always find death was accidental where there is a question of fact it imposes an undue burden upon the insurer when, as is the normal case, the only evidence of the cause of death is circumstantial. Nor is the social policy favoring the payment of life insurance very persuasive in this instance for life insurance needs are not dependent upon the manner of death.

Statements of Good Health

In *Bronx Savings Bank v. Weigandt*,[13] the plaintiff brought an action to rescind a policy of savings bank life insurance which it had issued to the deceased approximately three months before his death. The insurer contended that the insured had falsely represented that he was in good health;[14] and that the policy never took effect because the insured was not in good health when the policy was delivered and the first premium paid. The defendant-beneficiary counterclaimed for the face value of the policy.

The insured, who died as the result of injuries, had stated in the application that he never had or been told that he had tuberculosis, and none was found by the Bank's medical examiner. At the trial it was established that the deceased was suffering from active tuberculosis of the spine at the time he applied for the insurance, but it was not shown that he knew or had reason to know of his condition. Faced with the rule that a life insurance applicant's statements are representations and not warranties[15]—hence rescission will not be granted unless there is a fraudulent misrepresentation[16]—the plaintiff argued that the Court will

11. See a.g., MATHESON AND PRINCE, EVIDENCE, Foundation Press (1949) p. 35.
12. *Jahn v. The Commercial Travelers Mut. Assoc., of Am.*, 256 App. Div. 835, 9 N. Y. S. 2d 257 (2d Dep't 1939); *Steinmann v. Metropolitan Life Ins. Co.*, 257 App. Div. 656, 15 N. Y. S. 2d 51 (1st Dep't 1939).
13. 1 N. Y. 2d 545, 136 N. E. 2d 848 (1956).
14. These words appeared at the bottom of a page of the application: "Except as stated above I am now in good health. The statements herein are true . . . and made for the purpose of inducing the Bank to issue insurance on my life."
15. N. Y. INSURANCE LAW §142(3). For definitions and explanations of the words *representations* and *warranties* as regards life insurance contracts see 37 WORDS AND PHRASES 40; BLACK, LAW DICTIONARY (4th ed. 1951) 1465, 1758.
16. *Sommer v. Guardian Life Ins. Co.*, 281 N. Y. 508, 24 N. E. 2d 308 (1939).

rescind a contract when there is an *innocent* misrepresentation about which a mutual mistake of fact is made.[17] In dismissing the plaintiff's action and affirming the decisions of the Appellate Division[18] and Special Term[19] which had awarded judgment to the defendant, the Court relied on the reasoning in *Sommer v. Guardian Life Ins. Co.*[20] The Court held that the parties did not intend to condition the insurance upon the existence of good health; the representations were aids to the insurer in determining whether or not it would accept the risk and did not become a part of the contract so as to provide grounds for rescission if in fact they were false. To void the policy, then, the insurer must prove the applicant knew the falsity of his representations.

As a second ground for rescission the plaintiff contended that, since the first premium did not accompany the application, it was a condition precedent to the insurance's taking effect that the applicant be in good health when the policy was delivered and the first premium paid.[21] Therefore, the insurance never took effect because the insured was afflicted with a tubercular disease. A reading of clause "2" by itself would seem to support the plaintiff's position. But the Court determined that clause "2" must be read with clause "1" for it immediately follows the latter and incorporates part of it by reference, and since clause "1" manifests the insurer's intent to be bound if the applicant is in apparent good health (i.e., acceptable on the basis of the medical examination and the responses in the application), one might reasonably interpret good health as having the same meaning in each instance. Consonant with this interpretation, a reasonable person might conclude that the policy took effect unless the applicant's health changed between the date the risk was accepted and the payment of the first premium. This ambiguity is attributed to the insurer and must be resolved against it.[22]

Although the Court has advised life insurance companies that, in the absence of legislation to the contrary, they may condition their protection upon objective

17. See *Bloomquist v. Farson*, 222 N. Y. 375, 118 N. E. 855 (1918).

18. *Bronx Savings Bank v. Weigandt*, 286 App. Div. 748, 146 N. Y. S. 2d 625 (1st Dep't 1955).

19. *Bronx Savings Bank v. Weigandt*, 207 Misc. 820, 141 N. Y. S. 2d 629 (Sup. Ct. 1955).

20. 281 N. Y. 508, 24 N. E. 2d 308 (1939). This decision upheld a judgment for the beneficiary in a case where the applicant had stated that he was in good health when in fact he had an easily discoverable heart disease.

21. The insurer relied on the following clause: "I agree that: 1. If the first premium has been paid when this application is delivered to the Bank . . . the policy shall take effect as of the date of completion of the medical examination . . . provided the Bank shall be satisfied that . . . the person to be insured was a risk acceptable to it on said date . . . and provided further that the person to be insured was in good health on said date. 2. If the first premium has not been so paid, the policy shall not take effect until the first premium is paid and the policy delivered while the person to be insured is in good health."

22. *Hartol Products Corp. v. Prudential Ins. Co. of America*, 290 N. Y. 44, 47 N. E. 2d 687 (1943).

good health,[23] this case indicates the reluctance of the Court to find this requirement where there is the least ambuguity in the contract. Essentially this is sound, for, having disclosed all information as regards one's state of health and having submitted to a medical examination, the insured relies upon his policy being in full force and his beneficiary ought not be deprived of the proceeds because of an unknown pre-existing impairment of health. This is true even though the company may not void the policy after two years.[24]

Duty to Defend

Does a promise to defend any suit seeking damages against the insured under a comprehensive personal liability policy encompass a suit to enjoin the insured from maintaining a nuisance? This question was before the Court in *Doyle v. Allstate Insurance Company.*[25]

The defendant had issued a policy whereby it agreed to discharge any liability of the plaintiff caused by animals kept on his property, and to defend any suit seeking damages on account thereof "even if such suit is groundless . . .". An adjoining land owner and his wife commenced suit to enjoin the insured from operating a kennel for dogs on the ground that this activity was a nuisance which impaired the value of their property and was injurious to their health. When the insurer refused to defend, counsel was retained who conducted a successful defense. In the instant case, the plaintiff sought to recover $250.00 as legal fees and expenses in the original suit and in addition $350.00, the cost to maintain this action.

In reversing the Appellate Division's decision[26] which had affirmed a judgment granting defendant's cross-motion for summary judgment, the Court rejected the contention that damages could not have been awarded in the original suit, defendant's argument in justifying its refusal to defend. The Court recognized that a plaintiff who fails in proving an equitable cause of action will not have his case retained so that damages can be awarded upon showing the violation of a legal right.[27] But damages, *i.e.,* a money judgment, are awarded in cases where the facts are sufficient for equitable relief but it is either impractical or impossible to grant the relief requested, or where damages are incidental to or in addition

23. *Sommer v. Guardian Life Ins. Co., supra,* note 16, and cases cited therein.
24. N. Y. INSURANCE LAW §155 (1) (b).
25. 1 N. Y. 2d 439, 136 N. E. 2d 484 (1956).
26. *Doyle v. Allstate Ins. Co.,* 1 A. D. 2d 738, 147 N. Y. S. 2d 200 (3d Dep't 1956).
27. *Bradley v. Aldrich,* 40 N. Y. 504, 100 Am. Dec. 528 (1869); *Merry Realty Co. v. Shamokin and Hollis Real Estate Co.,* 230 N. Y. 316, 130 N. E. 306 (1921).