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## Insurance Law—Duty to Defend

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good health,<sup>23</sup> this case indicates the reluctance of the Court to find this requirement where there is the least ambiguity 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.<sup>24</sup>

### 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*.<sup>25</sup>

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<sup>26</sup> 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.<sup>27</sup> 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

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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).

thereto.<sup>28</sup> Because the Court has this power it could, under proper circumstances, have awarded some kind of damages in the original action, and, therefore, the Court decided that under the terms of the policy the insurer obligated itself to defend this kind of action. It was held, however, that the plaintiff could not recover the \$350.00 of additional expenses incurred in bringing this action.

This writer feels that, since the insurer had promised to defend suits even if they are "groundless, false or fraudulent," the Court of Appeals was correct in deciding that the defendant was not justified in refusing to defend because damages were not recoverable in the original action. The Court's limiting the plaintiff to the taxable costs of the present action is in accordance with the law of damages on this point.<sup>29</sup>

### Cooperation With Fire Insurer

The standard fire insurance policy for New York contains, among others, the following provisions: that the insured upon request shall submit to examinations under oath and also produce all books of account, bills, invoices and other vouchers;<sup>30</sup> that in case of failure to agree as to loss either may select an appraiser;<sup>31</sup> that the entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact;<sup>32</sup> and that no suit or action on the policy shall be sustainable unless all the requirements of the policy have been complied with.<sup>33</sup>

In *Happy Hank Auction Co. v. Am. Eagle Fire Ins. Co.*,<sup>34</sup> the insured appealed from a judgment<sup>35</sup> affirming dismissal of an action for specific performance of the appraisal provision and granting the defendant's motion for summary judgment on its defense of wilful and fraudulent withholding of information. The action was commenced when the parties failed to agree on the loss resulting from a fire in the plaintiff's furniture store—plaintiff claimed total loss of \$129,000 of which \$20,000 was for merchandise missing or unidentifiable after the fire. The insurance company thought these figures were grossly exaggerated. The Company conducted an examination, requested records, and also asked to examine the

28. *Valentine v. Richardt*, 126 N. Y. 272 27 N. E. 255 (1891); *Haber v. Paramount Ice Corp.*, 239 App. Div. 324, 267 N. Y. Supp. 349 (2d Dep't 1933), *aff'd.*, 264 N. Y. 98, 190 N. E. 163 (1934) (by implication); *Queens Plaza Amusements Inc. v. Queens Bridge Realty Corp.*, 265 App. Div. 1057, 39 N. Y. S. 2d 463 (2d Dep't 1943).

29. CLARK, N. Y. LAW OF DAMAGES §145 (1925).

30. N. Y. INSURANCE LAW §168 (6) (Lines 117-123).

31. *Ibid.* (Lines 123-140).

32. *Ibid.* (Lines 1-6).

33. *Ibid.* (Lines 157-161).

34. 1 N. Y. 2d 534, 136 N. E. 2d 842 (1956).

35. *Happy Hank Auction Co. v. Am. Eagle Fire Ins. Co.*, 286 App. Div. 505, 145 N. Y. S. 2d 206 (1st Dep't 1955).