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Article 18

Guidelines Established for Attorney's Fees Recoverable When Indemnitor "Leaves" Indemnitee

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stances.[67] Therefore, counsel should take care to include all amounts due at the time when he initiates his original action in order to insure collection of all the sums due.

Guidelines established for attorney's fees recoverable when indemnitor "leaves" indemnitee.

In *Clarke v. Fidelity & Casualty Co. of New York*,[68] plaintiff, a firm of consulting engineers and landscape architects, agreed to indemnify the State for any damage resulting from the plaintiff's negligence. Pursuant to this agreement, plaintiff was "impleaded" [69] in a supreme court action against the individual contractors and "vouched-in" [70] in an action commenced in the Court of Claims. Upon notice to their insurer of these pending actions, and the subsequent "repudiation" by the insurer of the contractual agreement to defend,[71] plaintiff acquired the assistance of a private law firm. The court, awarding damages to the plaintiff for the costs of these services, held that one who is "vouched-in" or "impleaded" is himself being sued.[72] Thus, where the insurance contract stipulates that the company shall defend any suit against the insured no matter how "groundless, false or fraudulent," the factual, legal or jurisdictional validity of the commenced suit does not vitiate the duty to defend.[73]

In addition to a lengthy discussion of the "vouching-in procedure," *Clarke* offers the practitioner a detailed guideline for

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[67] *Haviland* shows that the courts will not go out of their way to vacate a prior judgment in order to nullify the defense of splitting a cause of action, unless there are circumstances which would make it manifestly unjust to bar the second action. *See also* Maloney v. McMillan Book Co., 52 Misc. 2d 1006, 277 N.Y.S.2d 499 (Syracuse City Ct. 1967).

[68] 55 Misc. 2d 327, 285 N.Y.S.2d 503 (Sup. Ct. N.Y. County 1967).

[69] *See* CPLR 1007.

[70] *See* 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1007.03 (1965). *See generally* Hartford Acc. & Indem. Co. v. First Nat'l Bank, 281 N.Y. 162, 22 N.E.2d 324 (1939); *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 145-46 (1965).

[71] *See* 55 Misc. 2d 327, 330, 285 N.Y.S.2d 503, 505 n.1 (Sup. Ct. N.Y. County 1967). The court stated that by repudiating in relation to the Court of Claims action, it was not necessary that additional notice be given the insurer of the subsequent impleading of plaintiff in the supreme court proceeding. The latter, the court held, is an anticipatory breach. *Id.* at 352, 285 N.Y.S.2d at 525.

[72] Two cases of similar conclusion are Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 136 N.E.2d 484, 154 N.Y.S.2d 10 (1956) (injunction action held to be a "suit for money damages" under the insurance contract); Madawick Contracting Co. v. Travelers Ins. Co., 307 N.Y. 111, 120 N.E.2d 520 (1954) (arbitration held a "suit").

[73] *See* Goldberg v. Lumber Mut. Cas. Ins. Co., 297 N.Y. 148, 44 N.E.2d 131 (1948) which the court considered an adequate analogy to the instant case.

determining what attorney's fees an insured is entitled to when his indemnitor leaves him. "Leaving him," the court implied, occurs when the insurer, upon notice of suit, fails to defend its client within a reasonable time thereafter. In such a situation, the insurer will be liable for all reasonable attorney's fees in relation to suits actively pending against its insured.

ARTICLE 31 — DISCLOSURE

Article 31: Disclosure available to obtain material in opposition to motion attacking personal jurisdiction.

In *Cronin v. New England Storage Warehouse Co.*,[74] the plaintiff sought damages for breach of contract. In his answer the defendant alleged, *inter alia*, that the court had no personal jurisdiction; and in a letter to the plaintiff the defendant made it known that he was going to move for a dismissal on that ground. The plaintiff then served written interrogatories upon the defendant concerning the question of jurisdiction; and the defendant moved for a protective order striking the interrogatories.[75] The defendant on the basis of pre-CPLR cases[76] claimed that disclosure was not available to obtain material to oppose a motion attacking the court's jurisdiction. The court held that under the CPLR the remedy of disclosure is definitely available on a motion attacking jurisdiction of defendant's person, and is available in the case even though the jurisdictional motion is not yet pending.

CPLR 3211(d) provides that if it appears, from affidavits submitted in opposition to a motion made under CPLR 3211(a)[77] or (b), that there are facts essential to justify the opposition, "the court may . . . order a discontinuance to permit . . . disclosure to be had. . . ." The decision in *Cronin* seems to fall within the design of CPLR 3211(d)[78] and the disclosure provisions of article 31. Much time and expense may be saved if the merit or lack of merit of defendant's motion can be established prior to the hearing of the motion.

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[74] 54 Misc. 2d 1088, 284 N.Y.S.2d 59 (Sup. Ct. Richmond County 1967).

[75] CPLR 3103 provides for the issuance by the court of protective orders regulating the use of disclosure in order to prevent prejudice to any of the parties.

[76] Norton v. Cromwell, 248 App. Div. 107, 290 N.Y.S. 707 (1st Dep't 1936); *In re* Erlanger, 231 App. Div. 70, 246 N.Y.S. 745 (1st Dep't 1930); Debrey v. Hanna, 182 Misc. 824, 45 N.Y.S.2d 551 (Sup. Ct. N.Y. County 1943).

[77] CPLR 3211(a)(8) allows a person to move for a dismissal on the ground of lack of personal jurisdiction.

[78] "The clear intendment of the rules is to permit disclosure to elicit pertinent evidence concerning proof of issues involving jurisdictional questions." 54 Misc. 2d at 1088-89, 284 N.Y.S.2d at 60.