NOTES

IS PREJUDICE NECESSARY TO LIABILITY INSURER'S DEFENSE OF FAILURE TO COMPLY WITH THE COOPERATION CLAUSE?

Automobile liability insurance policies today almost universally include so-called "cooperation" clauses.[1] In general, these clauses provide that as a condition of the policy, the insured must cooperate with the insurer in the conduct of any suits based thereon, and must not settle any such claims without the full knowledge and consent of the insurance company. It is now established that, under certain circumstances, failure of the insured to comply with the cooperation clause gives the insurer a valid defense against an injured third party.[2] However, the question is far from resolved as to whether the insurer must, in order to establish its defense based on the non-compliance with the clause, show affirmatively that such non-compliance by the insured has operated to its prejudice.

Those courts which hold that the insurer should be permitted a valid defense even though the failure to cooperate has not prejudiced its cause in any way either regard the compliance by the insured as a *condition precedent*[3] to recovery, to be strictly

1. "Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident." State Farm Mut. Automobile Ins. Co. v. Arghyris *et al.*, 189 Va. 913, 916, 55 S.E.2d 16, 19 (1949).

2. The leading case is Hynding v. Home Accident Insurance Co., 219 Cal. 743, 7 P.2d 999 (1932). A contrary decision had previously been reached in Edwards v. Fidelity Casualty Co., 11 La. App. 176, 123 So. 162 (1929). It was there held that the insured's non-compliance with the cooperation clause could not stand as a defense against the injured person even though the insurer had thereby been prejudiced. However, the case was later overruled by Jackson *et ux* v. State Farm Mut. Automobile Ins. Co., 23 So.2d 765 (La. App. 1945). The *Jackson* case was reversed on appeal, 211 La. 19, 29 So.2d 177 (1946), only because the upper court held that the evidence showed that the insurer was not "substantially prejudiced," that there was no fraud or collusion, and the insured's conduct was reasonable under the circumstances. Thus it was recognized that the injured party's action might have been extinguished if the insured's failure to cooperate had been of a different nature.

3. N. J. Fidelity & Plate Glass Insurance Co. v. Love, 43 F.2d 82 (4th Cir. 1930); Bachhuber v. Boosalis, 200 Wis. 574, 229 N.W. 117 (1930).

construed, or conceive of such failure as inherently prejudicial to the insurer.[4] On the other hand, those courts which have denied the insurer a defense in the absence of a showing of prejudice and have allowed recovery by the injured third party in such situations have made little or no attempt to present a satisfactory explanation for reaching the results they deem equitable.[5] The conclusion has usually been justified by a mere statement as to the relative hardship of the insurer on the one hand and the innocent injured third party on the other.

The issue is pointed up with unusual clarity in a recent Virginia decision.[6] One Bohler, who was operating the insured's automobile with the latter's permission and hence within the "omnibus" coverage clause,[7] was in an automobile accident in which a minor child was injured. Several days later,[8] Bohler telephoned the insurer's agent, informing him that he, Bohler, had been erroneously accused of having been involved in an accident. After the original false denial of complicity, and after making affidavits which substantially confirmed his original story, Bohler, without the knowledge of the insurer or its agents, pleaded guilty to a criminal charge of "hit-and-run" driving[9] relative to the same accident. Such conduct on the part of Bohler constituted a flagrant and unquestioned violation of the clause.

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4. Fischer v. Western & Southern Indemnity Co., 106 S.W.2d 490 (Mo. App. 1937); Bauman v. Western & Southern Indemnity Co., 230 Mo. App. 835, 77 S.W.2d 496 (1934).

5. Conroy v. Commercial Casualty Ins. Co., 292 Pa. 219, 140 Atl. 905 (1928); George v. Employers' Liability Assurance Corp., 219 Ala. 307, 122 So. 174 (1929); Cowell v. Employers' Indemnitiy Corp., 326 Mo. 1103, 34 S.W.2d 705 (1930); Metropolitan Casualty Ins. Co. v. Albritton, 214 Ky. 16, 282 S.W. 187 (1926); Glade v. General Mutual Ins. Association, 216 Iowa 622, 246 N.W. 794 (1933); see Notes, 72 A.L.R. 1455 (1931), 98 A.L.R. 1469 (1935).

6. State Farm Mutual Automobile Ins. Co. v. Arghyris *et al.*, 189 Va. 913, 55 S.E.2d 16 (1949).

7. The "omnibus clause" extends the coverage to any one operating the automobile with the permission of the insured. The court does not make a point of the fact that the failure to cooperate was on the part of the insured's bailee, rather than the insured himself. It thus may be assumed that such bailee, within the omnibus provisions, occupies the same position as the insured in respect to the cooperation clause.

8. The exact time was not established by the evidence. The accident had occurred May 7, 1947, and the telephone conversation was established only as some time prior to May 12, 1947.

9. Bohler stated that his reason for pleading guilty was that if he received a sentence of more than six months, he would be automatically discharged from the Navy.

The plaintiff-minor brought a civil suit against Bohler based on the alleged accident, as did the father for damages arising out of the son's injuries. Judgment was rendered for the plaintiff in each action, and execution was returned unsatisfied because of "No Effects"; the father and son then instituted two actions to recover from the insurer the amount of the two unsatisfied judgments. On motion of the parties, the two actions were consolidated.

The insurer defended on the ground that Bohler had not complied with the cooperation clause, and the plaintiffs did not attempt to controvert the fact of non-compliance. However, the issue drawn in the trial court was whether such non-compliance had prejudiced the insurer, and the findings were in the negative. The trial court determined that the insurer had been sufficiently apprised of the facts, and thus not prejudiced in its defense of the suit. Judgment was then entered for the plaintiffs and the defendant-insurer took a writ of error to the Supreme Court of Appeals of Virginia.

The appellate court, after noting that the question of law was one of first instance in Virginia,[10] held that the trial court had misconstrued the true issue, and that the mere fact of non-compliance with the cooperation clause was sufficient to absolve the insurer from liability. It thus held the question of prejudice immaterial. In so doing, the court in effect treated compliance with the cooperation clause as a *condition precedent* to the liability of the insurer, the breach of which of itself precludes recovery.

It is well settled that a failure on the part of the insured to cooperate with the insurer gives a valid defense to the insurer where it has been prejudiced.[11] Furthermore, there is considerable authority today that the insurer may escape liability even though not prejudiced by failure to cooperate.[12] In *Coleman v. New Amsterdam Casualty Co.*,[13] the court declared compliance

10. The only previous Virginia case on the same issue was Indemnity Ins. Co. of North America v. Davis' Adm'r., 150 Va. 778, 143 S.E. 328 (1928). But the insurer's liability was there predicated upon its premature and unwarranted repudiation of responsibilities under the contract, constituting a waiver of its defense. Thus whether a showing of prejudice was necessary to the defense did not have to be decided.

11. Hynding v. Home Accident Insurance Co., 214 Cal. 743, 7 P.2d 999 (1932).

12. See note 3, *supra*.

13. 247 N.Y. 271, 160 N.E. 367 (1928).

with the clause to be a *condition precedent* to recovery by the injured party. Therefore the fact that cooperation would in no way have aided the insurer was held to be immaterial. Said Chief Justice Cardozo of the Court of Appeals:

> The argument (that a full disclosure would have revealed no defense to the insurer) misconceives the effect of a refusal. Cooperation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. The case is not one of the breach of a mere covenant, where the consequences may vary with fluctuations of the damage. There has been a failure to fulfill a condition upon which obligation is dependent.[14]

This same view may take another form, as shown by an opinion of the Supreme Court of Illinois in 1931.[15] There the court adopted a modification of the *condition precedent* doctrine by ruling that prejudice was to be presumed from the very failure to cooperate. Apparently the court regarded the failure to cooperate as inherently prejudicial, for it said:

> Without the presence of the insured, and his aid in preparing the case for trial, the insurance company is handicapped and such lack of cooperation must result in making the action incapable of defense.[16]

It should be noted, however, that in this case the failure to cooperate was very likely prejudicial, since the insured was the only witness available. However, the language of the court to the effect that the lack of cooperation *ipso facto* results in prejudice to the insurer is common. This type of reasoning leads to the same result as the *condition precedent* doctrine itself, holding an affimative showing of prejudice unnecessary to the defense.

The authority that prejudice to the insurer is vital to the defense is well predicated upon the dictum in *Hynding v. Home Accident Insurance Co.*,[17] the leading case establishing that the insurer's defense might be asserted against the injured third party. There, the insured failed to assist the insurer in obtaining witnesses and even failed to testify at the trial, although the defendant-insurer had tendered him his expenses. The

14. *Id.* at 276, 160 N.E. at 369.
15. Schneider v. Autoist Mutual Insurance Company, 346 Ill. 137, 178 N.E. 466 (1931).
16. *Id.* at 140. 178 N.E. at 468.
17. 214 Cal. 743, 7 P.2d 999 (1932).

court's holding was clearly based on the prejudice of the insurer's interest resulting from the non-compliance. Thus the court stated:

> We are also of the opinion, and think most of the authorities are agreed . . . that the violation of the condition by the assured cannot be a valid defense against the injured party unless it appears in a particular case that the insurance company was substantially prejudiced thereby.[18]

And again:

> Under these circumstances, the company was clearly prejudiced by his failure to appear. In any event, the question of such prejudice should have been considered below.[19]

Some courts, in following the *Hynding* case, have observed the important qualification recited therein, disallowing the defense in the absence of prejudice. Thus the Supreme Court of Errors and Appeals of Connecticut, in *Ranchon v. Preferred Acc. Ins. Co. of N. Y.*,[20] held that even where the insured deliberately misinformed the insurer, there was no violation of the cooperation clause, because the failure to cooperate must have adversely affected the insurer's interests in some substantial and material way. The court reasoned that since the true information would not have availed the insurer, the latter was not deprived of any advantage by the insured's conduct. *Thus the clause is held not even to be violated where no prejudice is shown.* Whether one agrees with the result, it is apparent that the court is reading something into the cooperation clause which is not contained therein.[21]

The Court of Appeals of Louisiana (Second Circuit) squarely met the issue in *Levy v. Indemnity Ins. Co.*[22] In this case the insured brought the action against the insurer as curator for the injured party, his brother. In determining whether the insurer's defense should depend upon a showing of prejudice, the court recognized the split of authority, and then adopted the rule requiring that prejudice be shown. The court quoted from 6 Blashfield, *Cyclopedia of Automobile Law and Practice*:

> However, in order that there may be a breach of a condition requiring the insured to cooperate with the liability insurer,

18. *Id.* at 752, 7 P.2d at 1002.
19. *Ibid.*
20. 118 Conn. 190, 171 Atl. 429 (1934).
21. There is of course no language in the "cooperation clause" to the effect that it is complied with if no prejudice results to the insurer.
22. 8 So.2d 774 (La. App. 1942).

> so as to avoid the latter's liability under the policy, lack of cooperation must be material; and it is necessary, in order to establish a defense under such a provision, that the insurer show that the failure of the insured to cooperate with it was of such gravity as to prejudice it.[23]

It is submitted that the better view both legalistically and in common fairness is that, in the absence of a positive showing by the insurer that its position was prejudiced by the violation of the cooperation clause by the insured, the injured person should prevail.

As a matter of strict legal reasoning, this conclusion is reached by noticing what the nature of the cooperation clause really is and thereby what the legal effect of its violation should be. The first obvious fact is that the time during which the insured is called upon to cooperate is after the automobile accident, when the cause of action against the insurer has already arisen. It is thus post-casual in point of time and designed only to aid the insurer defend an action, the other party to which has already sustained a loss. Thus the non-compliance, if it be held a defense, would extinguish an already existent cause of action, operating as a *condition subsequent*,[24] rather than as a *condition precedent* as mislabled by many courts. For reasons already suggested, the performance of a post-casual condition, a *condition subsequent* in insurance law, should be liberally construed and in fact has been by the courts.[25] A typical illustration is that of the condition that proofs of loss be furnished the insurer. In construing such a condition in the policy, the courts have properly regarded the fact that whereas the insured stands to lose the advantage of a contract right perfected all the way up to the point of loss, the insurer, on the other hand, seeks only the assurance that it be properly apprised of the loss.[26] In view of the relative hardships in such a situation, substantial performance of the post-casual condition has been very generally held sufficient.[27]

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23. *Id.* at 780.
24. VANCE, HANDBOOK OF INSURANCE LAW 780, 781 (2d ed. 1930).
25. COUCH, CYCLOPEDIA OF INSURANCE LAW 5481 (1930).
26. Further, there is more reason for liberal construction in favor of the entirely innocent party suing on a liability policy than for the insured in other situations whose own conduct may have placed him in default.
27. Kravat v. Indem. Ins. Co. of North America, 152 F.2d 336 (6th Cir. 1946); Burbank v. National Cas. Co., 43 Cal. App.2d 773, 111 P.2d 740 (1941); Commercial Cas. Ins. Co. v. Stinson, 111 F.2d 63 (6th Cir. 1940); State Mut. Ins. Co. v. Watkins, 181 Miss. 859, 180 So. 78 (1938); Crowe

It should be noted that the treatment of a *condition subsequent* in insurance law is different from a *condition subsequent* in contract law generally. In the latter, no latitude is allowed in the requirement and anything less than strict compliance will operate to extinguish the cause of action.[28]

It would seem further that compliance would be substantial up to the point at which its shortcomings cause actual prejudice to the insurer. One important purpose of the cooperation clause and its validity as upheld by the courts is to protect the insurer against collusive conduct and afford it every opportunity to formulate any valid defenses it might have. When there are no such defenses available in any event, the failure to cooperate should not be said to defeat the purposes of the clause; and when the purposes of the clause are not defeated, it would seem that it has been substantially complied with.

Common fairness points the same way. The words of the court in *Edwards v. Fidelity & Casualty Co.*[29] indicate the relative hardships:

> As to the hardship and disadvantage under which the insurer labors, and the difficulty under which the injured party finds himself, we think that the ends of justice require that the benefit of the doubt should be given the injured party, who is in no way at fault and whose loss was caused entirely by someone else, as against the insurer who has entered into the contract with full knowledge of the statute and for a monetary consideration.[30]

A recognition of the nature of the cooperation clause provides the reasoning for the conclusion reached by some courts that the question of prejudice is the one upon which liability should depend. Thus an affirmative showing of prejudice is properly held to be a necessary element in the liability insurer's defense based on the non-compliance with the cooperation clause by the insured, when asserted against the injured third person.

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v. Metropolitan Life Ins. Co., 5 Sch. Reg. 47 (1937); Scott v. Inter-Insurance Exchange of Chicago Motor Club, 352 Ill. 572, 186 N.E. 176 (1933); Metropolitan Life Ins. Co. v. People's Trust Co., 177 Ind. 578, 98 N.E. 513 (1912); Solomon v. Continental Fire Ins. Co., 160 N.Y. 595, 55 N.E. 279 (1899); Sergent v. Liverpool & London & Globe Ins. Co., 155 N.Y. 349, 49 N.E. 935 (1898); Paltrovich v. Phoenix Ins. Co., 143 N.Y. 73, 37 N.E. 639 (1894); McNally v. Phoenix Ins. Co., 137 N. Y. 389, 33 N.E. 475 (1893).

28. WILLISTON, CONTRACTS §§ 675, 809 (2d ed. 1938).

29. 11 La. App. 176, 123 So. 162 (1929).

30. *Id.* at 178, 123 So. at 163.