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LIABILITY INSURANCE: EFFECT OF FALSE STATEMENTS ON DUTY TO COOPERATE

ADRIAN P. SCHOONE* AND MICHAEL M. BERZOWSKI**

INTRODUCTION OF THE PROBLEM

Whether and when discrepancies in statements by an insured to his insurer constitute a breach of the liability insurance cooperation clause is the subject of this article. A distinction is drawn at the outset, between wilful, intentional or fraudulent material variances, here discussed, and those variances which are unintentional, accidental, unimportant or inconsequential. The latter categories are considered not sufficient to constitute a breach of the clause under discussion.

As a practical matter, the question is fundamentally one of reconciling rights, that is to say:

When the question arises as to whether or not an insured has breached the cooperation clause, sufficient to relieve the insurer of liability, courts are confronted with the problem of balancing the injured third party's interest in recovery and collection as opposed to the insurance carrier's interest in compliance and enforcement of the cooperation clause.

The primary obstacle inherent in the resolution of these opposing interests has been expressed in the following manner:

The clause cannot be interpreted in a way that would make it a mere device to entrap the insured, or a technicality so arbitrarily weighted that without detriment to the insurer in the performance of its obligation to defend, it wipes out that obligation, which is the essence of the contract . . . .

On the other hand, it must be remembered there exists a doctrine, cloaked with a mantle of “public policy,” that an injured party should be compensated for injury caused by an insured occurring subsequent to the issuance of the insurance contract. This approach finds support in the idea that it is somehow unfair to release the insurer from liability even though the insured has not cooperated, because of the carrier's receipt of insurance premiums.


1 The following format for a standard cooperation clause is suggested by RISJORD and AUSTIN, AUTOMOBILE LIABILITY CASES, Standard Provisions and Appendix, at 28 (1964): “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.”

2 Comment, A Solution to the Inequities From a Breach of the Cooperation Clause in Automobile Liability Insurance, 2 Hous. L. Rev. 92, 92-3 (1964).

The usual fact situation giving rise to a failure of cooperation issue occurs "... where the insured's statements tended to exculpate him from blame, leading the insurer to think that it could successfully defend the suit, and thereafter the insured admitted that the accident was his fault. ..." Alternatively, in some instances, the insured advises the carrier that he was at fault and subsequently indicates that he was not. At this point in the litigation, the insurance company is confronted with the dilemma of defending the suit on the merits of the negligence issue, and at the same time disclosing that its insured was a prevaricator of a very material fact bearing on the policy defense.

**Traditional Construction of the Cooperation Clause**

Satisfaction of the cooperation clause of the automobile liability insurance policy is generally regarded as a condition precedent to the liability of the carrier, although there is contrary authority. The effect of this construction is that the insured is required to actively cooperate with the company in the defense of the action, that is, upon the insurer's request, the insured must assist in settlements and the conduct of suits. But whether this requirement of active participation is labeled a condition precedent or a condition subsequent is probably a barren speculation, since it is a material condition of the policy, the violation of which destroys the insured's right to claim indemnity thereunder. Thus "due to certain basic policy considerations the approaches of the various courts, no matter which standard is applied, tend to produce similar results." It is a condition to the right of recovery.

The acknowledged purpose of the standard cooperation clause in automobile policies is to protect the insurer from the irresponsibility of the insured, to prevent collusion between the insured and a friendly claimant, and "... to put [the] insurer on notice and afford it an opportunity to make such investigation as it may deem necessary to properly defend or settle claims which may be asserted. ..." In general, the insured's responsibility is to assist and aid the insurer in

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48 Appleman, Insurance Law & Practice § 4782, at 140 (1962).


5 Id. at 31.


8 The Wisconsin Court in Bachhuber v. Boosalis, 200 Wis. 574, 575, 229 N.W. 117 (1930) said: "The provisions in the policy ... are conditions precedent. ..." For a general discussion of the condition precedent doctrine in Wisconsin, see De Salve v. Howell Plaza, Inc., 38 Wis. 2d 167, 156 N.W.2d 473 (1968).


preparing the case for trial or settlement. This obligation of the insured to assist and aid the insurer is usually satisfied by the insured's disclosure to the carrier of the pertinent facts surrounding the circumstances of the collision. It should be noted that this aid in preparation goes to the very crux of the agreement for cooperation between the parties. This purpose, of securing aid in suit or settlement, is achieved, as in other contractual undertakings, through the imposition of various rights and duties upon the parties.

What precisely are these rights and duties and what is meant by cooperation and disclosure?

The primary duty of the insurance company is to defend the insured in the ensuing lawsuit, and indemnify him for amounts which he is obligated to pay as a result of his fault. This is the "old philosophy" which considers the agreement between insured and insurer as a contract of indemnity for the protection of the insured. Conversely, the insurer is deemed to have the right to know from the insured the facts upon which the injured person asserts his claim, in order to determine for itself whether it should contest or attempt to settle. The company is entitled to an honest statement by the insured of the pertinent circumstances surrounding the accident, as he remembers them, and this statement should divulge all material and relevant facts. Of course, "cooperation does not mean that the assured is to combine with the insurer to present a sham defense."

The disclosure duty of the insured is generally expressed in varying degrees of truthfulness. Examples are: "full, fair, complete, and truthful disclosure of facts known to him relative to the accident;" "fair and frank disclosure of information reasonably demanded;" and giving "in good faith a truthful statement of the accident."

13 56 Mich. L. Rev. 1208 (1958). See also James and Thornton, Impact of Insurance on Law of Torts, 15 Law & Contemp. Probs. 431 (1950) for development of philosophy that insurance is a contract of liability and public policy demands its enforcement on behalf of innocent third parties. But cf. Royal Indemnity Co. v. Watson, 61 F.2d 614, 616 (5th Cir. 1932): "The contract of insurance was issued for the protection of the assureds against loss; it was not designed for the protection of strangers." See also Keeton, Ancillary Rights of the Insured Against His Liability Insurer, 28 Ins. Counsel J. 395 (1961).
In essence, the cooperation clause binds the insured to the exercise of good faith, and when he speaks concerning the facts of the accident, he must speak the truth. As summarized by the Federal Court of Appeals for the Ninth Circuit in Home Indemnity Co. of N. Y. v. Standard Acc. Ins. Co.:

Truthfulness seems to be the keystone of the cooperation arch. The insured must tell his insurer the complete truth concerning the accident, and he must stick to this truthful version throughout the proceedings. He must not embarrass or cripple his insurer in its defense against a civil suit arising out of the accident, by switching from one version to another, he must not blow hot and cold to suit his personal convenience.

Thus in the construction of the clause there is a requirement that an honest disclosure be made, no matter who is helped or hurt. "It is basic that an insurer cannot determine whether there is a defense to a claim if the assured does not give it a complete and accurate statement of the cause, condition and circumstances of the accident." The importance of this idea cannot be overemphasized since "If insurers may not contract for fair treatment and helpful cooperation by the insured, they are practically at the mercy of the participants in an automobile collision."

Though the rules are quite easily stated in the abstract, practical application of them in current litigation presents several problems. The primary obstacle is the growing public policy interest of the law that an injured party be compensated for his injury. The essence of this philosophy, as stated in Kurz v. Collins is:

[W]here the rights of an injured third party have intervened subsequent to the issuance of the contract of insurance, the insurer should not be freed from liability to such third party, on the ground of noncooperation of the insured in having made a false statement, unless the insurer has been harmed thereby.

In addition to the assumed undesirability of an injured party not being compensated, some authorities argue that because the insurer has been collecting premiums for the risk assumption, it should indem-

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25 Foote v. Douglas County, 29 Wis. 2d 602, 139 N.W.2d 628 (1966); Stippich v. Morrison, 12 Wis. 2d 331, 107 N.W.2d 125 (1961); Kurz v. Collins, 6 Wis. 2d 538, 95 N.W.2d 365 (1959).
26 6 Wis. 2d 538, 549, 95 N.W.2d 365 (1959).
nify irrespective of the action of its insured. The insurer, in effect, becomes a substitute for the insured even though the insurer is not the perpetrator of the tort. Considering that an injured party need not recover against the carrier, assuming a solvent tortfeasor-insured, it could be suggested that any recovery obtained from the insurer in situations wherein the insured has less than fully cooperated, constitutes a "windfall" to the injured third party. Nevertheless, the policy of compensating the injured party, and concomitant construction of the contract as an agreement for the benefit of the general public, is in vogue. This tendency was judicially expressed in a comparatively recent case as follows:

The duty of the court is to be alert to protect insurers in circumstances where close family relationship or association tend . to ally the sympathy of the insured to those with whom the insured may be liable, and normally, in evaluating credibility, such factors are taken into account. We must, on the other hand, recognize that insurance policies protect not only the insured, but the general public . . . .

In Allstate Insurance Co. v. Keller, this public policy approach was stated by an Illinois appellate court in the following language:

... it is apparent that a contract of insurance is of vital concern to all who own and operate such vehicles, to their passengers, and to all who venture forth as mere pedestrians. It [the contract of insurance] is not just an agreement limited to the parties but by its very nature has become one cloaked with a public interest.

STATEMENTS HELD TO BE A SUFFICIENT BREACH OF THE CLAUSE UNDER DIFFERENT JUDICIAL STANDARDS OF CONSTRUCTION

False or variant statements sufficient to breach the cooperation clause have been as varied as the imagination. Some common examples are: identity of the driver at the time of the collision, valid permission to operate the vehicle, mechanical condition of the vehicle, speed, consumption of intoxicants, cause of collision, and maintain-

33 United States Fire Ins. Co. v. Watts, 370 F.2d 405 (5th Cir. 1966); Hunt v. Dollar, 224 Wis. 48, 271 N.W. 405 (1937).
34 Car and General Ins. Corp. v. Goldstein, 179 F. Supp. 888 (S.D.N.Y. 1959);
nance of proper lookout. Whether such statements breached the clause in a given case depended upon the particular time at which the statement was made, the spirit in which made, i.e., good faith, and the philosophy adopted by the particular court in solving issues of this nature. The principle developed from past decisions has been summarized as follows:

An insured's willful and avowed obstruction by insured's efforts to defend an action brought against an insured will constitute a breach of the insured's contract's [sic] duty to cooperate, which breach, if material, and/or prejudicial will discharge insurer from liability under the policy.

The broad rule has been subjected to diverse judicial interpretation in the determination of whether a breach occurred and if it was prejudicial. Three standards have been adopted by the courts in gauging the degree of non-compliance sufficient to relieve the insurer of liability. These tests are the prejudice standard, the material breach standard and the presumption of prejudice standard.

The Prejudice Standard

The prejudice standard philosophy, followed by a majority of the courts, requires the insurer to prove that it was substantially prejudiced as a result of the insured's breach. This approach subscribes to the theory that the insurer has the burden of establishing that there was a breach of the policy provision. In this situation the insurer must show a high degree of non-compliance before the burden of proof shifts to the party asserting lack of prejudice. It must be remembered that substantial prejudice must be shown. In other words, if there are no valid substantive defenses to the claimant's action, the insured's failure of cooperation is deemed harmless and not substantial non-compliance nor prejudicial. The "... more recent cases clearly indicate that the insured's... non-cooperation must, on some conjectural or probability basis, have left the insurer 'less able to resist a claim against its insured...'." However, in some jurisdictions actual prejudice must be shown; the "possibility of prejudice to the insurer will not be sufficient for a finding of non-cooperation as a matter of law when the rights of an injured third party have arisen." Under these circumstances, "actual" as opposed to theoretical or suppositious prejudice must be shown. This approach places on the insurer the burden of...

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37 See Comment, supra note 2 for discussion of various standards.
38 Pretzel, supra note 36, at 329.
39 Foote v. Douglas County, 29 Wis. 2d 602, 139 N.W.2d 628 (1966).
40 Id. at 608, 139 N.W.2d at 631.
41 Stippich v. Morrison, 12 Wis. 2d 331, 107 N.W.2d 125 (1961).
proving an unknown quantity, the existence of which is at best only conjectural.\textsuperscript{42} Regardless of the test imposed, whether actual or theoretical prejudice, it is submitted that some prejudice exists in every case in which an insured relates false versions of the incident to his carrier or its attorneys. In any such case, disadvantages to the insurer arise in preparation and defense of a suit commenced by the injured party.\textsuperscript{43} This problem has been expressed as follows:

When the true facts were disclosed, the company had to exactly reverse its position with regard to essential facts and virtually proclaim their parties and chief witnesses to be liars and wholly unworthy of belief. Practically its only props were struck from under it.

Moreover had the insurer proceeded to defend on behalf of its assured, it faced the spectre of having its principal witnesses denounced in open court as perjurers in view of the 'about face' in their stories. . . .\textsuperscript{44}

The detrimental effect of an insured's varying version of the facts surrounding the alleged tort is further amplified by present day liberal discovery rules. Since counsel can ask witnesses on cross-examination if they have given statements of the facts of the accident to anyone and if answered in the affirmative these statements must be produced,\textsuperscript{45} the possibility of complete destruction of the insured's credibility arises, even though the carrier is apprised of the breach prior to the litigation. The jury thus learns that the witness had not told the truth in the first instance,\textsuperscript{46} and the variation in statements can result in the loss of the insured's credibility as a defense in the action brought by the injured party against him.

As summarized in \textit{Buffalo v. United States Fidelity & Guaranty Co.}, "... the company is deprived of the opportunity to negotiate a settlement, or to defend upon the solid ground of fact. Nothing is more dangerous than a client who deliberately falsifies the facts."\textsuperscript{47}

\textbf{The Material Breach Standard}

The material breach standard requires the insured to carry the burden of proving compliance with the terms of the contract, once the

\textsuperscript{42}Comment, \textit{supra} note 2, at 97-8.

\textsuperscript{43}Quisenberry v. Kartsonis, 297 S.W.2d 450 (Mo. 1956).

\textsuperscript{44}Home Indem. Co. of N.Y. v. Standard Acc. Ins. Co. 167 F.2d 919, 926-7 (9th Cir. 1948).

\textsuperscript{45}Shaw v. Wuttke, 28 Wis. 2d 448, 137 N.W.2d 649 (1965); Jacobi v. Podevels, 23 Wis. 2d 152, 127 N.W.2d 73 (1964); Kurz v. Collins, 6 Wis. 2d 538, 95 N.W.2d 365 (1959). \textit{See also}, Annot., 73 A.L.R.2d 12 (1960); Annot., 22 A.L.R.2d 659 (1951).


\textsuperscript{47}84 F.2d 883, 885 (10th Cir. 1936); Hall v. Preferred Acc. Ins. Co. of N.Y., 204 F.2d 884 (5th Cir. 1953); Great Am. Ins. Co. of N.Y. v. Dennis, 203 F. Supp. 482 (W.D. Ky. 1962). \textit{See also} Fidelity & Cas. Co. of N.Y. v. Griffin, 178 F. Supp. 678 at 681 (S.D. Tex. 1959): "[The insurer] was deprived . . . of the truth, a weapon of the greatest value in investigating or attempting to settle litigation of this nature."
insurer has shown that a breach has occurred. This approach subscribes to the theory that the cooperation clause is a condition precedent to the liability of the insurer. Unlike the prejudice standard approach, the question of prejudice or detriment to the carrier resulting from the breach is immaterial, as is the fact that compliance with the clause would not have aided the insurer.

The leading case adopting this test was *Coleman v. New Amsterdam Casualty Co.* This case involved a druggist, insured against liability for mistake, who refused to state the details of a mistake for which he was sued unless the insurer would promise to pay any amount for which the druggist was found liable. The court, after recognizing the fact that the insurer would have been no better off if the insured had made the truthful disclosure, said, "Cooperation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end. . . ."

The jurisdictions applying the material breach test favor a more strict construction of the insurance contract. The vital consideration therefore appears to be the degree of materiality ascribed to the insured's misrepresentations. The court in *Fidelity & Casualty Co. of N. Y. v. Griffin* held that: "Conduct of the two assureds, which was designed to cause the insurer to defend the State court proceeding under a complete misapprehension of a highly important fact, can hardly be characterized as insubstantial. . . ." Thus to satisfy the test in a jurisdiction using the material breach standard, the significant consideration appears to be the relative degree of non-compliance of the insured in relating the facts to the carrier. Prejudice to the carrier is not required, although it would probably be present in the case of a material breach.

The jurisdictions favoring this approach have adopted a more literal interpretation of the contract between the carrier and the insured. A frequent criticism of this theory is that it permits an insurer to escape liability on technical grounds, and in effect render a nullity that which is the essence of the contract. But, the "... harshness of this view is however, mitigated by the fact that many of these courts speak in terms

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50 Id. at 276.
53 E.g., in United States Fire Ins. Co. v. Watts, 370 F.2d 405 (5th Cir. 1966) it was held that the failure of the insured to tell the truth in regard to beer drinking activities for 18 months and until just before the trial was a material misrepresentation sufficient to work a breach.
54 Comment, supra note 2, at 98.
of 'material non-compliance.' Therefore, this hedge in interpretation would probably operate to preclude a carrier's escape from liability in cases wherein release would tend to be unconscionable or against "public policy" as determined by the particular court.

The Presumption of Prejudice Standard

The presumption of prejudice standard, which represents the minority view, presumes that prejudice exists once a breach has been proved by the insurer. In these jurisdictions, the burden is on the insured to rebut the presumption and show that in fact his non-compliance did not result in prejudice to the carrier. If the insured can overcome the presumption, the case will proceed on the substantive merits.

This test is primarily of historical interest, since in the recent case of *Campbell v. Allstate Insurance Co.*, the California Court decided to abandon this standard, which it alone had previously espoused:

No statutory basis for the presumption of prejudice has been cited or found, and presumptions should not be created judicially unless there are compelling reasons for doing so. ... The presumption would not be in keeping with the public policy of this state to provide compensation for those negligently injured in automobile accidents through no fault of their own.

In referring to the *Valladao* case, the *Campbell* court mentioned that in that case, prejudice had been established by facts proved and that it was therefore unnecessary to determine whether a showing of prejudice should be required.

Thus, as a result of the *Campbell* case, it appears that litigants throughout the county will now be confronted with either the material breach or the prejudice standard in cases involving breaches of the cooperation clause.

GENERAL OBSERVATIONS

Regardless of which test is adopted, certain variables exist which are incapable of precise determination, such as the good and bad faith of the carrier and insured. For example, it could be surmised that an irresponsible insured or one guilty of intentional misstatement would probably not receive the same consideration as an insured who gave an unintentionally erroneous version of the facts. Similarly, a distinction could be drawn between a carrier with a legitimate policy defense and one attempting to avoid liability because of a mere technicality. In other words, some weight must be assigned to certain intangibles in the balancing of the rights of the respective parties.

Although it is difficult to determine with precision the outcome in

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57 Ibid.
59 Id. at 829, 384 P.2d at 157.
a specific fact situation, there appears to be a growing proclivity favoring recovery for the injured party. Courts are increasingly reluctant to deny recovery even though an insured has less than fully cooperated, when an otherwise innocent party will go uncompensated for his loss. Some writers have concluded that there exists a notion that it is "open season" on insurance companies and that all means are justified in effecting recovery from the carrier. How this judicial attitude squares with the written insurance contract presumably circumscribing the carrier's contractual obligation is not clear in some of the opinions. It might be hypothesized that the underlying theory is that all injured persons should be compensated.

The cumulative effect of these views may favor the prevaricator and injured party at the expense of the casualty insurer issuing a policy containing rather explicit terms. This sometimes results in a better contract for the parties than they chose to make for themselves. However, this approach may constitute a two-edged sword for the general public, as the following comment demonstrates:

It [the contract of insurance] is not just an agreement limited to the parties but by its very nature has become one cloaked with a public interest. Integrity should be the essence of the agreement. The cost of insurance is based upon the ratio of claims paid to the risk written. It is the owners and operators of vehicles upon whom the financial burden of maintaining such contracts must ultimately fall. . . . The courts cannot condone or support a doctrine that might ultimately make the cost of insurance protection prohibitive. Compliance with its terms is, therefore, vital to all who may benefit, either directly or indirectly, from its provisions.

Perhaps compensation for the injured party should not be the primary consideration in balancing the equities in all cases. If the insured cannot bring himself within the conditions of the policy, should his insurer be nevertheless obliged to indemnify him and redress the injured victim?

**Effect of False Statements on Coverage in Wisconsin**

The Wisconsin decision long relied upon by insurers when raising policy defenses based upon non-cooperation is *Hunt v. Dollar.* In

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63 The New York court citing Coleman v. New Amsterdam Gas. Go., in Home Indem. Co. of N.Y. v. Standard Acc. Ins. Co., 167 F.2d 919, 929 stated the converse of this proposition: [A]nd if the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. In short, the law does not make a better contract for the parties than they chose to make for themselves.”
65 224 Wis. 48, 271 N.W. 405 (1937).
that case, after first joining with the insured in an answer denying the insured's negligence, the insurer obtained leave of court, upon notice with supporting affidavits, to file a supplemental answer alleging that (1) the insured made false and untrue statements as to the material facts; (2) the insured induced witnesses to make false and untrue written statements as to material facts; and (3) the insured himself falsely testified on adverse examination as to the material facts of the accident. The issues thus raised were tried separately by a jury. The false statements, which were made in written reports of the accident to the insurer and in adverse examination, were concerned with the extent of the insured's drinking. He said that he had not been drinking prior to the accident when in fact he had consumed considerable intoxicants.

The Supreme Court affirmed the action of the trial court in granting judgment notwithstanding the verdict, dismissing the complaint as to the insurer. The reason given for the affirmance was that the false statements violated the express conditions of the policy requiring disclosure of information and full cooperation. The court stated that: "In cases of breach of condition it is immaterial whether the breach in fact prejudices the insurer."\textsuperscript{6}

Quoting from the leading New York case of Coleman v. New Amsterdam Casualty Co.,\textsuperscript{67} Justice Fowler said:

The plaintiff makes the point that the default should be condoned since there is no evidence that cooperation, however willing, would have defeated the claim for damages or diminished its extent. For all that appears the insurer would be no better off if the assured had kept its covenant, and made disclosure full and free. The argument 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 the fluctuations of the damage. There has been a failure to fulfill a condition upon which obligation is dependent.\textsuperscript{68} (emphasis added)

Thus in this case the court appeared to have adopted the so-called material breach standard. The test was whether or not a condition of the contract was breached. The court did not consider whether the insurer was actually prejudiced by the false statements.

The Hunt case was followed in Hoffman v. Labutzke,\textsuperscript{69} wherein the insured, after the trial, stated to the trial attorney for both defendants that his testimony was false, as was his statement to the insurer immediately following the accident and his sworn statement made during

\textsuperscript{6} Id. at 54, 271 N.W. at 408, .
\textsuperscript{67} 247 N.Y. 271, 160 N.E. 367, 369 (1928).
\textsuperscript{68} 224 Wis. 48, 54, 271 N.W. 405 (1937).
\textsuperscript{69} 233 Wis. 365, 289 N.W. 652 (1940).
the adverse examination. The court, citing *Hunt v. Dollar*, said that the cooperation clause was specifically made a condition of the policy and that "... breach of conditions voids the policy."\(^7\) The material breach standard was again followed.

But in the more recent case of *Kurz v. Collins*,\(^7\)\(^1\) where the insured falsely stated in writing, on two different occasions, that he was the driver of the automobile when in fact a learner was driving at the time of impact with a pedestrian, the court modified the rule of the *Hunt* case.

In laying the foundation for a failure of cooperation grounded upon variance in statements made by the insured, it was said that the variance must not only be material, but also conscious, that there must be a deliberate and wilful falsification. After setting forth the deliberate and wilful falsification requirements, the court distinguished the role of the jury and the court in cases of this nature. The former has the duty of determining whether the alleged false statement or testimony was consciously made, while the latter is charged with the responsibility of determining whether the statement or testimony is material. At this point in the opinion, the following comment regarding the *Hunt* case and materiality was made:

> When it is stated that a false statement or testimony must be material in order to breach a policy cooperation condition, it means that the same must be material to the issue of the liability of the company on its policy. In a sense, whether a false statement or testimony is material to the insurance company's liability on its policy is closely akin to whether the company has been prejudiced thereby, but we deem materiality to be broader in scope than prejudice. In *Hunt v. Dollar* ... this court stated, "In cases of breach of condition it is immaterial whether the breach in fact prejudices the insurer." We consider this declaration to have been unintentionally misleading. It is apparent from the context in which such sentence appears in the opinion that what the court was attempting to say was that it is immaterial that the insurer was not in fact prejudiced.\(^7\)\(^2\)

The court then observed that the possibility of the prior false statements being used on trial for impeachment purposes existed, but said that:

> ... we cannot view the issue solely from the standpoint of the two contracting parties, the insurer and the insured. The interests of third parties who have been injured or damaged as a result of the negligent operation of the insured vehicle must also be considered.\(^7\)\(^3\)

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\(^7\) Id. at 375, 289 N.W. at 656.

\(^7\) Id. at 365 (1959).

\(^7\) Id. at 546-7, 95 N.W.2d at 370.

\(^7\) Id. at 549, 95 N.W.2d at 371.
The court then concluded that:

... public policy requires that, where the rights of an injured third party have intervened subsequent to the issuance of the contract of insurance, the insurer should not be freed from liability to such third party, on the ground of non-cooperation of the insured in having made a false statement, unless the insurer has been harmed thereby.\textsuperscript{74}

This issue of harm the court refused to determine on motion for summary judgment.

Exactly how this interpretation of public policy squared with the philosophy in \textit{Watkins v. Watkins},\textsuperscript{75} that "... if the insurers may not contract for fair treatment and helpful cooperation by the insured, they are practically at the mercy of the participants in an automobile collision" is not clear. In any event, \textit{Kurz} appears to mark the adoption by Wisconsin of the prejudice standard in deciding cooperation cases of this nature.

The \textit{Kurz} case was cited in \textit{Polar Mfg. Co. v. Integrity Mut. Ins. Co.},\textsuperscript{76} a case in which the controversy centered around the insured's erroneous answers in the policy application for fire insurance. The court, citing \textit{Kurz}, said:

[T]his court held the question of whether there has been a breach of a co-operation clause of an insurance policy because of false statements by the insured presents a mixed question of law and fact, although sometimes the facts are so clear that there is no issue to submit to a jury.\textsuperscript{77}

The difficulty with the comment is that no guidelines were furnished to determine at what point the issue would be taken from the trier of fact.

In \textit{Stippich v. Morrison},\textsuperscript{78} the court affirmed the \textit{Kurz} public policy holding in the following words:

The mere possibility of prejudice having resulted to the insurer from a breach of condition of the policy by the insured is insufficient to prevent an adjudication that such breach was material where the rights of an injured third person have intervened. An actual showing of prejudice is required.\textsuperscript{79}

The court then overruled \textit{Heimlich v. Kees Appliance Co.},\textsuperscript{80} which had held that an insurer is relieved of liability for breach of condition by the insured occurring after the rights of an injured third person have intervened, without the necessity of showing any resulting prejudice or harm.

\textsuperscript{74} Id. at 549, 95 N.W.2d at 371.
\textsuperscript{75} 210 Wis. 606, 613, 245 N.W. 695, 698 (1933).
\textsuperscript{76} 11 Wis. 2d 105, 104 N.W.2d 164 (1960).
\textsuperscript{77} Id. at 108, 104 N.W.2d at 166.
\textsuperscript{78} 12 Wis. 2d 331, 107 N.W.2d 125 (1961).
\textsuperscript{79} Id. at 336, 107 N.W.2d at 127.
\textsuperscript{80} 256 Wis. 358, 41 N.W.2d 359 (1950).
Kurz was also cited in *Schneck v. Mutual Service Casualty Ins. Co.*, \(8^3\) a case involving a question of permission for use of a family automobile. The insured’s daughter allowed a friend to drive the vehicle and it was involved in a collision. The carrier contended that the father had violated the cooperation clause by deliberately and wilfully changing his story between the time his signed statement was taken and the time the complaint (in the daughter’s action) was filed. In this case, the father had given an unsworn statement to the defendant’s adjuster that the daughter was never to allow anyone else to drive the automobile. This statement was attached to the Safety Responsibility Report, \(8^2\) SR-21, filed by the insurer with the Wisconsin Motor Vehicle Department. In the complaint, however, the father stated that the vehicle was being used by the friend with the permission and consent of the father.

In response to the carrier’s contention, the court said: "Unless the testimony of [the father] at the trial was substantially contradictory to the information given to the defendant in the investigation, there would be no breach of contract for lack of cooperation."\(8^3\) The court pointed out, as in previous cases: "... the defendant needed to show it has been harmed by the alleged breach of the policy through lack of cooperation. In the absence of such a showing, the insurer is not relieved of liability to third parties."\(8^4\)

It is submitted that there is some harm in most cases in which an insured relates false or inconsistent versions of the collision to the insurer. This conclusion is reached because of current discovery proceedings. In the recent case of *Jacobi v. Podevels*, \(8^5\) the insured had given a statement relating the facts of the accident to the carrier’s adjuster a few days after the accident, before any action had been commenced or was imminent, and before counsel had been assigned to advise and defend the insured.

The court, in citing Kurz, recognized the importance of the insured’s statement when it said:

A statement of the kind under consideration will ordinarily be used by the insurer . . . to determine whether and on what basis adjustment of any claim shall be attempted. . . . Whether the accident under consideration involves clear, doubtful, or no liability . . . or otherwise indirectly involve[s] the personal interests of the insured, is often unknown at this stage.

When the insured makes such a statement he is ordinarily fulfilling a condition of his policy, requiring him to notify the insurer of the occurrence and circumstances of the accident and

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\(8^1\) 18 Wis. 2d 566, 119 N.W.2d 342 (1963).


\(8^3\) 18 Wis. 2d 566, 576, 119 N.W.2d 342 (1963).

\(8^4\) Id. at 576, 119 N.W.2d at 348.

\(8^5\) 23 Wis. 2d 152, 127 N.W.2d 73 (1964).
LIABILITY INSURANCE: DUTY TO COOPERATE 235

to cooperate with the insurer. If the statement be false, the insurer may use it against the insured as a foundation for a claim of non-cooperation.88

Upon the trial, during cross-examination of Jacobi, opposing counsel demanded and obtained Jacobi’s prior statement and used it in cross-examination. The rationale of the decision was that “the judicial system and rules of procedure should provide litigants with full access to all reasonable means of determining the truth,”87 It should be noted that this procedural rule lays the foundation for the impeachment and perhaps destruction of the credibility of the carrier’s witness in cases where the insured gives erroneous versions of the facts at any stage of the litigation. Although it may be speculated that opposing counsel may not avail himself of the benefits of this discovery rule, should the carrier be exposed to the risk?

The scope of these discovery procedures was enlarged in Shaw v. Wuttke,88 wherein the rule as to access to documents and files was extended to the attorney’s work product. In that case, the court stated:

We hold the immunity of the attorney’s work product in respect to a written statement ceases to exist when the person making the statement is placed on the stand as a witness at the trial. By becoming a witness the person subjects himself to the risks of impeachment and the attorney has had the benefit of his work product.89

It would seem, therefore, that under the Podevels and Wuttke cases, where a conflicting or false statement is made to the carrier or its attorney, there may be a finding of harm or detriment to the carrier.

Another recent Wisconsin case grounded upon inconsistent or untruthful statements and the related lack of cooperation is Foote v. Douglas County.90 In that case, the insured had originally given a signed statement to the carrier’s representative to the effect that the car involved was not to be driven without the insured’s permission. At the trial, the insured repudiated the statement, and the jury found that there was an implied consent to operation of the vehicle, and that the insured had not failed to cooperate with the insurer. The Wisconsin Supreme Court affirmed and said that “. . . in the case at bar, the insurer offered no proof to show how it was harmed by the . . . change in their stories. We must acknowledge that this was no mere gentle deflection . . . , it was a head-over-heels somersault.”91 The court then alluded to the Kurs public policy doctrine and stated:

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88 Id. at 156, 127 N.W.2d at 75-6.
87 Id. at 156-57, 127 N.W.2d at 76.
89 28 Wis. 2d 448, 137 N.W.2d 649 (1965).
90 Id. at 456, 137 N.W.2d at 653.
91 29 Wis. 2d 602, 139 N.W.2d 628 (1966).
91 Id. at 607, 139 N.W.2d at 631.
Thus, even though there is a possibility of prejudice to the insurer, it will not be sufficient to require a finding of non-cooperation as a matter of law when the rights of an injured third party have arisen; actual prejudice must be shown by the insurance company.\(^{92}\) (emphasis added)

The court went on to say:

... it appears that the insurer knew well in advance of the trial the extent of its insured's deviation. Under such circumstances, the trial court was justified in accepting the jury's determination that there was no failure to cooperate. The existence of prejudice to the carrier was not established.\(^{93}\)

The foregoing cases and conflicts among them appear to have been distilled by *Schauf v. Badger State Mutual Casualty Co.*\(^{94}\) In that case, several weeks after the collision, the insured gave a signed statement to his insurer stating that he was driving. Subsequently, upon the receipt of an “excess letter” after suit was commenced and before adverse examination, the insured denied in another signed statement given to the insurer that he was the driver. He further admitted that he and the other occupants of the automobile decided upon the earlier-related false story because he carried liability insurance and the person actually driving did not.

In the trial court, the insurer amended its answer to allege a policy coverage defense based upon the insured not being the driver and a policy defense based upon the non-cooperation of the insured in making false statements. The insurer upon its amended pleading and affidavits then moved for summary judgment dismissing the complaint. This motion was denied by the trial court. As to the policy defense, the trial court thought that there was only a possibility or a mere contingency of some harm to the insurer which might never occur and this possibility of harm did not warrant a summary judgment.

The opinion on appeal was delivered by Chief Justice Hallows. It professed to follow the *Kurz* rationale that when third parties' rights had intervened, a breach of the cooperation clause was not a defense unless the insured was harmed or prejudiced. The court acknowledged that this harm cannot be determined until the trial of the negligence-liability issue because the materiality of the alleged breach is measured in relation to the issue of the liability of the insurer on its policy. The logic supporting this position was:

If the insured is not found liable because he was not negligent, the insurer is not liable on his policy and the lack of cooperation was not in fact prejudicial or harmful and therefore not ma-

\(^{92}\) *Id.* at 608, 139 N.W.2d at 631.
\(^{93}\) *Id.* at 608, 139 N.W.2d at 631.
\(^{94}\) 36 Wis. 2d 480, 153 N.W.2d 510 (1967).
However harm may be apparent prior to the determination of the issue of negligence. . . \(95\) (emphasis added)

The court went on to say, following the reasoning of Kurz and the trial court, that "... there was only a possibility that the false statements of the insured would be used at the trial for impeachment purposes and such possibility at the time the motion for summary judgment was being decided did not warrant a finding of such harm as ought to foreclose the third party from suing the insurance company."\(96\) The court then quoted from Kurz, "... should such prior statements be used for impeachment purposes at the trial of the instant case, there could be no doubt of their materiality and of the consequent breach of the cooperation clause."\(97\) It should be noted that this speculation fell within the realm of prejudice possibility, since the court could only guess whether the statements would be used for impeachment purposes. But the court felt a distinctive feature of the case was that the statement of the driver's identity affected coverage. The inconsistent statements of the insured forced the insurer into trying a negligence issue involving the insured as the driver, while at the same time defending that the insured was not the driver. The court held that these two positions were together indefensible. "To force Badger to forego either defense in order to strengthen the other is harm and prejudice within the meaning of a material breach of the cooperation clause as a matter of law."\(98\)

The court recognized that the insurer was obliged to expose its insured as a prevaricator of a material fact and to discredit him on direct proof of a material issue. They determined that, under Kurz, this constituted harm and prejudice to the insurance company because it was placed in a position where it could not raise a legitimate defense without discrediting its own witness. Under these circumstances, the court said that it is:

"... immaterial which statement is false because if the case were presented to a jury any verdict would be the result of and bear the stamp of a fact finding process the integrity of which has been contaminated by inconsistent statements and incredibility of the insured as a witness. The prejudice and harm to the insurer on these facts are the denial of a fair determination of its liability."\(99\)

**CONCLUSION**

The reasoning of Chief Justice Hallows in Schauf raises the basic query whether an insured is not prejudiced when defending any case

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\(95\) Id. at 485, 153 N.W.2d at 513.

\(96\) Id. at 486, 153 N.W.2d at 513.

\(97\) Ibid.

\(98\) Id. at 487, 153 N.W.2d at 513.

\(99\) Id. at 488, 153 N.W.2d at 514.
where the insured deliberately gives varying versions of the collision. The insurer in such instances must risk impeachment of its insured while defending the liability issues. Under present broad discovery rules, statements of the insured given to insurer and attorney are available to opposing counsel. If these statements conflict at trial, the insured is discredited in the eyes of the jury. Perforce the insurer is penalized in the preparation and defense of the case. As mentioned in a relatively recent Missouri case:

... it needs no argument to sustain the proposition that insurer's counsel would have been substantially prejudiced in a material respect when at the trial of plaintiff's damage suit the credibility of each of its two witnesses, ... was impeached by their prior sworn testimony contrary to their trial testimony.100

Must an insurer participate in a trial vouching for the veracity of its insured on the liability issues, when it possesses evidence that he is not believable? No trial lawyer relishes representation of the carrier in those circumstances. Even though there is a strong public policy interest in protecting the rights of an injured third party, presumably within the limits of the fault doctrine,101 the elementary principle that the law does not make a better contract for the parties than they made for themselves must retain some vitality. As stated in a recent Illinois case:

The courts cannot condone or support a doctrine that might ultimately make the cost of insurance protection prohibitive. Compliance with its terms [the contract] is therefore vital to all who may benefit, either directly or indirectly, from its provisions. For this reason we are of the opinion that strict compliance is in the best interest of the public. ... 102 (emphasis added)

Another eminent authority, commenting on the prejudice requirement, has stated:

Such a rule is probably salutary where it is evident that the insured's infraction did not seriously impair the insurer's investigation or defense of the action. But if the rule is carried to the point of imposing an almost insurmountable burden of proving that the verdict was the result of the lack of cooperation, it would amount to a perversion of such contractual provision.103

Furthermore it should be remembered the third party is not "out-of-pocket" in cases wherein recovery from the insured is denied since the premiums were paid by the insured.

100 Quisenberry v. Kartsonis, 297 S.W.2d 450, 454 (Mo. 1956).
101 Miller, Preservation of the Doctrine of Fault, 35 Wis. BAR BULL. at 42 (Feb. 1962).
103 8 APPLEMAN, INSURANCE LAW & PRACTICE § 4773, at 108 (1962).
The liberal judicial policy\textsuperscript{104} of paying third parties must be weighed against the reality that the insurance contract necessarily imposes certain inescapable obligations upon the insured. These legal duties will be enforced unless today's system of insuring motorists on an underwriting-risk basis is to be completely abolished.

\textsuperscript{104}"Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." Cave, J., \textit{In re} Mirams, [1891] 1 Q.B. 594, 595.