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COMMENT

THE COOPERATION CLAUSE IN AUTOMOBILE LIABILITY INSURANCE POLICIES*

INTRODUCTION

Among the conditions contained in standard automobile policies is found the assistance and cooperation clause. This condition, broken down into its essential elements, appears as follows:

The insured shall

1. cooperate with the company,
2. assist in making settlements, in the conduct of suits, in enforcing any rights of contribution or indemnity,
3. attend hearings and trials,
4. assist in securing and giving evidence and obtaining the attendance of witnesses.

shall not (except at his own cost, voluntarily)

1. make any payments,
2. assume any obligation,
3. incur any expense,
other than for such immediate medical (and surgical) relief to others as shall be imperative at the time of the accident.

The clause is constructed in such a way that both a general duty as well as certain specific duties are stated. The first seven words set out the general duty, "the insured shall cooperate with the company," and this general duty is not limited by the succeeding list of specific items.

The list, in the latter part of this clause, of things that the insured shall do upon the company's request is not all-inclusive; that is, the more general phrase stating that the insured shall co-operate with the company is not limited by the succeeding list of specific items. Canons of construction concerning the resolution of ambiguities against the company and the limitation of the general by the particular are not likely to be applied to this duty of cooperation, since it is a duty that would surely be inferred by the courts from the relationship between the company and the insured even if the insurance contract were silent on the matter. 1

The obvious purpose of the condition was stated by the Supreme Court of Illinois as follows: "to enable the insurer to determine whether there is a defense to a claim growing out of the accident, and if so, to

* The clause is applicable only to Parts I—Liability, and III—Physical Damage, of the standard automobile liability insurance policy.
properly defend it." Additionally, the clause operates to protect the insurer's interest and to prevent collusion between the insured and an injured third party claimant. To facilitate this purpose, the condition places a duty on the insured which can be divided into two main areas. First, the insured must fully and completely disclose the facts and circumstances of the accident. Secondly, he must participate in the preparation and trial of the case in the manner requested by the insurer. These duties are not, however, burdensome or expensive and merely require good faith on the part of the insured. The insured need only pursue the same course he would have followed if the insurance contract had not existed and he had hired an attorney to defend him in his own right at his own expense. However, this ideal situation may not always exist. The various attitudes found in some people may make "good faith" mean different things when insurance is involved. An insured may feel that the payment of premiums casts the entire burden of post-accident action on the insurer. His efforts may be limited or changed by thoughts of an excess judgment, his personal financial position, his interpretation of fault and also by his relationship to the claimant. These factors along with others make the clause under consideration a very common matter for litigation.

In contrast to the insured's duty, the condition also requires the insurer to exercise good faith and diligence in bringing about cooperation, and coverage cannot be denied when the non-cooperation of the insured is occasioned by the insurer. The condition, therefore, contains reciprocal duties of good faith.

The cooperation clause is a material condition of the liability contract and has universally been held valid. The condition is generally held to be a condition precedent to the insurer's liability (the standard policy specifically makes all terms of the policy conditions precedent) and the insurer may, at his election, deny coverage if there is a breach. It should be noted that while the condition is generally held to be precedent to liability, many courts treat the condition as subsequent, especially on the question of pleading and proof, by holding that a breach of the cooperation clause is an affirmative defense and the burden of proof is upon the insurer. The problem and the importance of the correct legal title given to the condition was stated by the New Hampshire Court:

7 Watkins v. Watkins, 210 Wis. 605, 245 N.W. 695 (1932).
9 Id. at 31.
Whether a condition of the kind here involved shall be called a condition precedent as in *Bachhuber v. Boosalis*, 200 Wis. 574, 229 N.W. 117, or a condition subsequent as in *Medical, etc., Co. v. Light*, 48 Ohio App. 508, 194 N.E. 446, is perhaps a barren speculation, but since the effect of the assured's failure to cooperate is to relieve the insurer from an obligation which has already attached, subject to possible defeasance, it seems more in accord with the customary use of English terms to call this provision a condition subsequent. It is, in either event, a "material condition of the policy" the violation of which by the assured destroys the right to claim indemnity thereunder.\(^{10}\)

The duty of cooperation is placed upon the "insured" and this unqualified use of the word has been held to include the named insured and any other person using the automobile with the permission of the named insured.\(^{11}\) A breach of the condition by an additional insured may also relieve the insurer of liability.\(^{12}\) It may seem logical that "insured" as used in the condition under consideration would fall under the same rules of construction that govern the use of the word as it relates to persons insured under the policy in general. Such is not the case however and the case law makes numerous distinctions. Where the insured's son, operating the insured's automobile with the permission of the named insured, failed to cooperate in defending an action against the insured and the son for injuries arising out of the accident, the court held that such failure to cooperate did not affect the insured's right under the policy where the son was not a party to the insured's action against the company to recover the amount of a judgment previously entered against the insured.\(^{13}\) If the additional insured does not realize he is an additional insured under the policy, any failure to cooperate while under this belief does not apply to relieve the insurer of liability.\(^{14}\) In an Arkansas case,\(^{15}\) a taxicab driver, hired by the defendant to transport passengers from the company's disabled bus to their destination, was involved in a collision. The driver gave false information to the insurer and testified falsely at the trial. This action was not imputed to the insured to defeat coverage under the policy due to lack of cooperation. The court said:

> But the contention for appellant is that the law imputes the misconduct to the transportation company. The requirement of the policy clause which is relevant here is that the insured (cooperation) shall render the specified cooperation to the insurance company in that it shall at its cost provide the attendance of its

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\(^{13}\) Maryland Casualty Co. v. Lopopolo, 97 F.2d 554 (9th Cir. 1938).


driver involved in an accident at resultant legal proceedings. There is nothing in the contract, either expressed or reasonably to be implied, that the insured corporation shall vouch for the veracity of the driver, or that the driver shall cooperate with the insurance company. The reference is only to the insured's duty to provide the attendance of the driver. We find nothing in any of the cooperation provisions of the policy which can be construed to mean that the policy liability shall be terminated if the driver whom the insured was required to produce at the trial turns out to be an untruthful man.\textsuperscript{16}

Yet another problem is seen when the named insured seeks recovery from an additional insured. In this situation the clause is inapplicable as neither is required to cooperate to defeat his own action.\textsuperscript{17}

It can be seen that the use of the word "insured" in the cooperation clause must be considered in a different light than is the use of the word in reference to coverage under the policy.

\textbf{Effect of Breach}

The general statement that a breach of the condition relieves the insurer from liability under the policy must be tempered by the case law. The courts, when finding a breach, have gone further and set up "degrees of breach" which will or will not make the aforementioned general statement effective. Further, the various jurisdictions do not agree on what "degree of breach" operates as a sufficient breach to relieve the insurer of liability. It is generally held that a lack of cooperation in an unsubstantial or immaterial matter will not act to relieve the insurer.\textsuperscript{18} At this point the jurisdictions diverge, some holding that a "material and substantial" breach is required\textsuperscript{19} and others requiring that the insurer prove he was "substantially prejudiced" by the alleged breach.\textsuperscript{20} While the doctrine is no longer adhered to, some jurisdictions had presumed prejudice once a breach had been proven by the insurer.\textsuperscript{21}

Today, a clear majority of the jurisdictions adhere to the prejudice standard which places the burden of proof upon the insurer to prove that the breach was prejudicial to its ability to defend the action.\textsuperscript{22} The insurer must have been left "less able to resist a claim against its insured by defeating recovery or reducing the award of damages."\textsuperscript{23} The burden the insurer has under this doctrine is a heavy one and a showing that the insurer would be in a slightly more favorable position had the insured fully cooperated has usually been held insufficient to establish substantial prejudice.\textsuperscript{24} Where it appears there is no valid defense to

\textsuperscript{16} Id. at 316.
\textsuperscript{18} Connell v. Indiana Ins. Co., 334 F.2d 993 (4th Cir. 1964).
\textsuperscript{19} 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4773 n.21 (Supp. 1967).
\textsuperscript{20} Id. at n.22.
\textsuperscript{21} Valladao v. Fireman's Fund, 13 Cal. 2d 322, 89 P.2d 643 (1939).
\textsuperscript{22} 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4773 n.22 (Supp. 1967).
\textsuperscript{23} State Farm Mut. Auto. Ins. Co. v. Koval, 146 F.2d 118, (10th Cir. 1944).
\textsuperscript{24} Leach v. Fisher, 343 Mich. 65, 74 N.W.2d 881 (1956).
the action, even wilful lack of cooperation has been found unprejudicial.\textsuperscript{25} On its surface, this holding appears to work little hardship. However, the insurer's objectives regarding settlement and defense may have been substantially changed had it known the whole truth. The basic reason such a strict standard has been adopted in many jurisdictions appears to be a consideration of public policy protecting the innocent injured third party. The Wisconsin Court in \textit{Stippich v. Morrison}\textsuperscript{26} said:

[W]e balanced the intervening rights of such injured third persons against those of the insurer and concluded that the insurer should not be relieved from liability to such injured third person, because of breach of a policy condition by the insured, unless the insurer has been harmed thereby.\textsuperscript{27}

A minority of courts, and the minority is growing smaller, apply the "material and substantial breach" standard.\textsuperscript{28} This doctrine is followed in jurisdictions where the clause is strictly construed as a condition precedent\textsuperscript{29} or where failure to cooperate is regarded as inherently prejudicial.\textsuperscript{30} Again, the burden is upon the insurer to prove noncompliance of significant proportions. The fact that cooperation would not have aided the insurer is immaterial under this doctrine.\textsuperscript{31} Justice Cardozo gave a brief and pointed statement of this doctrine in \textit{Coleman v. New Amsterdam Casualty Co.}\textsuperscript{32} where he said: "Co-operation 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."\textsuperscript{33} The Illinois Supreme Court has specifically rejected the "prejudice" standard and maintained the "material and substantial" standard. The court said: ". . . we reject as obsolete and impracticable the concept that a breach of the cooperation clause must be asserted and determined on the basis of an actual showing of prejudice or detriment to the insurer.\textsuperscript{34}

A close reading of the cases from the various jurisdictions, however, leads one to believe that the practical difference between the two standards is small, yet of consequence. In a recent case the court classified the differences as follows:

Under both the material breach and prejudice standards, courts require the plaintiff in the action on the policy to go forward with specific proof of nonprejudice or immateriality once a noncompliance of significant proportions is shown by the insu-

\begin{itemize}
  \item \textsuperscript{25} Rochon v. Preferred Acc. Ins. Co., 118 Conn. 190, 171 A. 429 (1934).
  \item \textsuperscript{26} 12 Wis. 2d 331, 107 N.W.2d 125 (1961).
  \item \textsuperscript{27} \textit{Id.} at 337, 107 N.W.2d at 128.
  \item \textsuperscript{28} Note 19 supra.
  \item \textsuperscript{29} Bachhuber v. Boosalis, 200 Wis. 574, 229 N.W. 117 (1930).
  \item \textsuperscript{30} Bauman v. Western & So. Indem. Co., 230 Mo. App. 835, 77 S.W.2d 496 (1934).
  \item \textsuperscript{31} Schneider v. Autoist Mut. Ins. Co., 346 Ill. 137, 178 N.E. 466 (1931).
  \item \textsuperscript{32} 247 N.Y. 271, 160 N.E. 367 (1928).
  \item \textsuperscript{33} \textit{Id.} at 277, 160 N.E. at 369.
  \item \textsuperscript{34} Alistate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 50, 149 N.E.2d 482, 485 (1958).
\end{itemize}
rance company. It would seem that the most perceptible difference between the standards arises in determining the degree of seriousness of the noncompliance which will cast the burden of going forward on the plaintiff, the prejudice standard requiring a higher quantum than the material breach standard. In borderline cases, the material breach standard may throw the balance toward the insurer and the prejudice standard toward the insured or injured claimant.\(^{35}\)

The third and final standard which has been used is the "prejudice presumed" standard. While this standard is no longer used it is worthy of mention as it illustrates the developing trend in judicial construction of the cooperation clause.\(^{36}\) Under this standard, the burden is upon the insured to prove that the breach was not prejudicial to the insurer once the breach has been presented and proven by the insurer.\(^{37}\) This doctrine had been the established rule in California until 1963 when it was specifically overruled in *Campbell v. Allstate Ins. Co.*:

> Although it may be difficult for an insurer to prove prejudice in some situations, it ordinarily would be at least as difficult for the injured person to prove a lack of prejudice, which involves proof in the negative. 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.\(^{38}\)

With this ruling, California overruled the previous cases which held that prejudice would be presumed as a matter of law upon a showing of a breach of the cooperation clause and the doctrine was eliminated. This holding and the reasons stated illustrate the direction in which the courts are heading and the reasons for such a course.

**FALSE STATEMENTS**

Truthfulness seems to be the keystone of the cooperation arch. The insured must tell his insurer the complete truth concerning the accident and 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.\(^{39}\)

In the above case the insured made five separate statements which included four varying versions regarding his responsibility for the death of two pedestrians: (1) insured had not been in any accident; (2) insured had not been in any accident that he knew of; (3) the accident must have happened while he was asleep; (4) insured was guilty

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of the crime of hit and run in connection with the accident. The insurer was relieved of liability.

This case offers an excellent example of the dilemma in which an insurer can find itself. What action should it take when it is first told its insured had no accident, later is faced with a confession and finds all areas in between also admitted? Should it settle, deny coverage, or defend? Fact situations similar to this illustrate one of the basic reasons for the clause under consideration. An insurance company is entitled to an honest statement by the insured of the pertinent circumstances surrounding an accident subjecting the company to a possible loss as the insured remembers them. Without that the company is deprived of the opportunity to negotiate a settlement or to defend upon the solid ground of facts. However, a jury finding contrary to the insured's version is not, as a matter of law, lack of cooperation. In Commercial Standards Insurance Co. v. Readnour the insured, in a sworn statement, stated that a passenger was driving at the time of the accident. The passenger stated, also in a sworn statement, that the insured was driving. A jury verdict in favor of the passenger finding that the insured was driving was held insufficient, as a matter of law, to find lack of cooperation in the degree necessary to relieve the insurer of liability.

As previously stated, any breach of the condition must be material and substantial. Therefore, the falsehood must relate to a material fact. However, it need not be conclusive of the issue of liability. In Valladao v. Fireman's Fund Idem. Co., the insured repeatedly and wilfully misrepresented to the insurer over a period of several months the actual identification of the driver of the automobile involved in an accident. This was held to be a breach sufficient to relieve the insurer even though, under the omnibus provisions of the policy, coverage was extended to any person operating the vehicle. Therefore, in fact, the company was liable regardless of the driver's identity. The court stated:

In other words, the insurer is entitled to a truthful statement of the circumstances of an accident from its assured even though under a so-called "omnibus clause" it would equally be liable for the negligence of another, if such other actually operated the automobile at the time of the accident and had not been wilfully misrepresented by the assured as being the operator at such time.

The company had been misled as to the actual facts of the accident and this may have affected its judgment as to settlement or procedure for defense. Under the facts presented, had the company defended its major witness would have been subject to possible impeachment.

40 Annot., 139 A.L.R. 771, 784 (1942) citing Buffalo v. United States Fidelity & G. Co., 84 F.2d 883 (10th Cir. 1936).
41 241 F.2d 14 (10th Cir. 1956).
The insured may, after making a false statement, admit the fact and come forward with the truth. Jurisdictions have dealt with this problem in various ways.\textsuperscript{44} New York, interpreting the clause strictly as a condition precedent, has held that false statements, whether corrected or not, which mislead the insurer are deemed to be prejudicial. The reasoning used is that the credibility of the insured is destroyed and this fact would hurt any defense possible. In \textit{Fidelity \& Casualty Co. v. Holdeman},\textsuperscript{46} the insured stated that the plaintiff fell on the insured's property when she knew that he did not. This statement was promptly corrected. The court stated:

We find that the discrepancy was material and that it destroyed the insured's credibility and usefulness as a defense witness in the personal injury action. We hold that her conduct constituted a breach of the cooperation clause and, hence, the plaintiff-insurer is entitled to judgment.\textsuperscript{46}

Even under this strict construction of the clause, bad faith or a wilful falsehood must be present in fact or inferentially.\textsuperscript{47} In a recent case Judge Hand held that a corrected falsehood, while initially a breach, could be tolerated if the insured showed that the falsehood had no effect upon the verdict. He stated:

It seems to us that any deliberate falsification as to an issue involved in the case even collaterally, is a failure of the cooperation promised by the insured, but it is not necessary to hold that every such failure will inevitably defeat the insured's claim. In the case at bar, we know that the jury incorrectly decided the particular issue as to who was driving the car, but we do not know how far the change in the insured's stories as to the driver discredited their testimony exonerating them from liability. Having failed to cooperate it lay upon them to show that their failure had no effect upon the verdict.\textsuperscript{48}

Michigan has held that repudiation of a statement favorable to the defense two weeks prior to trial did not constitute a breach.\textsuperscript{49} The court stated that no prejudice or loss was shown to the company by the conduct of the insured and the company had two weeks in which it could investigate, settle or otherwise adjust to the turn of events. The court noted that no continuance had been requested. The Wisconsin Supreme Court recently restated and reviewed the necessity of prejudice to the insurer resulting from false statements. In \textit{Schauf v. Badger State Mutual Casualty Co.}\textsuperscript{50} the insured, Thur, stated he was driving the automobile of a friend at the time of an accident. The friend's automobile

\textsuperscript{44} Annot., 34 A.L.R.2d 264 (1954).
\textsuperscript{46} Id. at 879, 259 N.Y.S.2d at 898.
\textsuperscript{50} 36 Wis. 2d 480, 153 N.W.2d 510 (1967).
being uninsured, the company entered into the defense of the action under coverage granted in its policy to a non-owned automobile. The policy limit was $10,000 and since the complaint demanded damages in excess of this amount, an "excess letter" was sent. Evidently realizing that some personal liability could result, the insured admitted he was not the driver of the car. The court, in holding for the insurer and dismissing the complaint, stated:

In Kurz v. Collins, 6 Wis. 2d 538, 95 N.W.2d 365 (1959), dealing with a motion for summary judgment in which a non-cooperation defense was urged, we held that when third parties' rights had intervened, a breach of the cooperation clause was not a defense unless the insurer was harmed or prejudiced thereby. Normally, this harm cannot be determined until the trial of the issue on liability in respect to negligence because the materiality of the alleged breach is determined in reference to the issue of liability of the insurer on its policy. 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 material. However, harm may be apparent prior to the determination of the issue of negligence. The court pointed out that false statements relating to the identity of the driver of a car could be material as a matter of law because of the present certainty of the prejudicial or disastrous effect on the fact finding process. . . . Thus, many cases involving the defense of lack of cooperation are such that the issue cannot be determined until after the determination of the negligence-liability question and while the third party may prevail on this issue, harm may have been proved on the breach of cooperation issue and thus the insurer would prevail on its policy defense.51

However, in State Farm Mutual Insurance Company v. Walker,52 a case arising under the Indiana guest statute and presenting facts similar to those in Schauf, the federal court held that prejudice could not be determined prior to the final decision in the action where there were controverted facts at issue. Summary judgment had been granted to the insurer and the federal court reversed on appeal.

The interpretation presented by the Michigan and Wisconsin courts appears to be in the majority, and a showing of a substantial contradiction in material breach jurisdictions or substantial prejudice in jurisdictions which require this type of breach, coupled with bad faith, appears necessary.53 The burden remains upon the insurer.

**Failure to Appear at Trial**

Generally speaking, the insurance contract is based on a concept of indemnity and the legal liability of the insurance carrier is derived from its payment of damages for which its insured will

51 Id. at 485, 153 N.W.2d at 512.
52 382 F.2d 548 (7th Cir. 1967).
become legally liable. Consequently, it is within the contemplation of the parties that the insured will be present and will assist and aid in the defense of the charges made against him in order to prevent or at least lessen the damages which will comprise the basis of indemnity. The contemplated availability of the insured is a material factor and his disappearance, his failure to be present for depositions or trial, would be substantial and consequential matters and lack of cooperation as to these would be sufficient to void the policy.54

The above statement must again be limited by the law in the various jurisdictions which require the insurer to show prejudice or substantiability of the breach.55 This burden is on the insurer and he must also affirmatively show good faith and reasonable diligence to secure attendance. New York, however, requires only the showing of non-appearance as a breach of the condition and, if shown, presumptive prejudice results.56 In another case, coverage was denied when the named insured failed to attend the trial concerning an accident he had not even witnessed.57 Generally, the cases held that the testimony of the absent insured must be material to the defense of the action and such absence must be wilful. Mere absence alone is not sufficient.58 Leaving the state after testifying by deposition has been held not to be a failure of cooperation.59 In the same light, the failure of an insured to appear was held not prejudicial where the possible testimony would only have tended to establish the insurer's liability.60 However, in Glens Falls Indem. Co. v. Keliher,61 it was held that the fact that the insured's testimony was likely to establish liability did not support the insured's allegation that his absence did not harm the insurer and that his failure to be present therefore was not material. The court said:

There are both practical and theoretical answers to this argument. Every person familiar with the trial of cases by jury knows that the case of an individual defendant is seriously, if not hopelessly, prejudiced by his absence from the trial. Such absence, if not adequately explained, is a circumstance "chiefly persuasive in its effect," . . . which normally affects the decision of the jury upon all questions submitted to them. Even if the liability of the defendant were admitted or conclusively established, it cannot be doubted that the mental attitude of the jury in assessing damages

55 Terbell, Cooperation of the Insured in Automobile Liability Cases—Attendance at Trial, 16 DEFENSE L.J. 139 (1967).
would be influenced by his unexplained absence from the courtroom.\textsuperscript{62}

Procedurally, the insurer has been held to be under no obligation to move for a continuance\textsuperscript{63} and any excuse offered by the insured for his absence must be one which would receive favorable consideration on a motion for new trial.\textsuperscript{64}

Correlative to the insured's duty to assist the insurer through his attendance at trial is the duty of the insurer to reimburse the insured for all reasonable expenses connected with such attendance. The supplementary payment clause of most policies reads: "To pay, in addition to the applicable limits of liability: . . . all reasonable expenses, other than loss of earnings, incurred by the insured at the company's request." In \textit{American Fire & Casualty Co. v. Vliet}\textsuperscript{65} the insured rendered every possible assistance to the insurer in the action against the insured. A judgment was rendered against the insured after which the insured moved some 750 miles away. A garnishment action was instituted against the insurer. Upon the insurer's request for the insured to return for the trial the insured offered to return only if the insurer would pay her expenses. The court held for the insured and stated that the insured must attend the trial without reimbursement for loss of time or wages\textsuperscript{66} but is not required to attend at his own expense for out-of-pocket costs. The requirement that the insured attend trial without any reimbursement for loss of wages may be unreasonable and the argument might prevail that it would be unreasonable to require attendance if the possible loss would be disproportionately high. The first revision of the special package automobile form (January 1, 1963) provides that the insurer will pay "reasonable expenses incurred by the insured at the company's request, including actual loss of wages or salary (but not loss of other income) not to exceed $25 per day because of his attendance at hearings or trials at such request." While the provision provides for a maximum of $25 per day the argument might still prevail that it would be unreasonable to demand attendance if the loss would be much greater than the stated amount.

\textbf{Refusal to Sign Pleadings}

In order to make a complete, fair and legitimate defense in an action it is necessary for the insurer to have signed pleadings. This problem usually presents itself when the insured refuses to verify the answer.

\textsuperscript{62} \textit{Id.} at 258, 187 A. at 476.
\textsuperscript{63} Goldstein v. Bernstein, 315 Mass. 329, 52 N.E.2d 559 (1944).
\textsuperscript{64} Hartford Acc. & Indem. Co. v. Partridge, 183 Tenn. 701, 192 S.W.2d 701 (1946).
\textsuperscript{65} 148 Fla. 568, 4 So. 2d 862 (1941).
\textsuperscript{66} \textit{See also} Randolph v. Employers Mut. Liab. Ins. Co. of Wis., 260 F.2d 461 (8th Cir. 1958).
It has generally been held and quite properly, we think, that a knowing and wilful refusal to verify an answer in order that the insurance company may defend an action against him, constitutes a failure to co-operate and a breach of the conditions in the policy. 67

The insured, however, is under no obligation to combine with the insurer to present a sham defense. 68

While the refusal of the insured to assist in asserting a valid defense will excuse the company from liability . . . yet, if his co-operation is improperly demanded, as where he is asked to aid in asserting a sham defense, his failure to co-operate will not release the company from its obligation under the policy. 69

It has been held that a refusal to verify an answer under a mistaken belief, honestly held and not for obstruction of the defense, would be excused. 70 It is the wilful refusal to verify a proper answer that will bring about a breach of the condition and relieve the insurer.

**FALSE OR CONFLICTING TESTIMONY AT TRIAL**

When the insured testifies at the trial, the insurer logically expects testimony substantially consistent to what the insured had previously stated. If the testimony differs materially and is false, the cooperation clause is breached. 71 New York, however, does not consider the truthfulness or falseness of the testimony to be of importance. Rather it is held that testimony which is materially variant from previous statements is clear evidence of a breach. 72 Under this rule, conflicting testimony and statements regarding who was driving, 73 speed 74 and position 75 of the automobiles has been held to relieve the insurer of liability.

This phase of the clause is often put to use when the insured has given testimony which is in sharp conflict to the facts as set out in the verified answer which was drawn from the statements of the insured. The insurer is entitled to rely upon the truthfulness of the allegations and denials as set out in the verified answer and to assume they will be supported by the insured's testimony. Of course, any variance between the testimony and statements of the insured must be material and substantial and a slight variance will not suffice. 76 "It is only natural

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68 Ibid.
70 Ibid.
76 Caron v. Farmers Ins. Exch., 252 Minn. 247, 90 N.W.2d 86 (1958).
that there should be some overlooked details that amount to variances between statements taken by the insurer and the insured's testimony."77 Some jurisdictions require not only that the breach be material and substantial but also require that it be due to a conscious and deliberate intent to deceive.78 Still other jurisdictions do not hold material variances at trial to be a breach of the clause if the trial testimony is true.79 This appears to be explained under grounds of public policy to encourage testimony at trials.

COLLUSION

One of the major purposes for inclusion of the cooperation clause in the insurance contract is to protect the insurer against collusion between the insured and the injured third party. The insured can not, by fraud or collusion, assist the claimant with the maintenance of his suit80 and is under a duty to refrain from any such conduct which may operate to the prejudice of the insurer in the conduct of the defense or settlement of the claim. It was held, however, that the insured's disclosure of insurance coverage to the claimant was not a breach of the cooperation requirements.81 The active participation of the insured in a garnishment suit, instituted by the claimant, after the initial suit had ended in a judgment against the insurer, did not avoid coverage.82 The giving to plaintiff's attorney of the same statement that had previously been given the insurer was not a breach83 and even obtaining a release from the plaintiff's attorney of that portion of damages which might be awarded in excess of the policy limits did not constitute a breach of the condition.84 As the above examples demonstrate, to establish collusion more than a mere act is necessary. The act must be purposely intended to aid the claimant and hinder the company and must correspond to bad faith. In essence, the elements of a conspiracy must be present. In State Farm Mut. Automobile Ins. Co. v. Boracci,85 the court stated that the insurer would be relieved of liability if the insured "fraudulently conspired" with the claimant to create the appearance of a valid cause of action against him. Similar reasoning was demonstrated in Storer v. Ocean Accident & Guarantee Corp.86 where the court said:

Whether Strohl failed to cooperate was to be determined by proper inferences to be drawn from the facts, and we think that the decided weight of the evidence, considered in the aggregate, is that he not only failed, but that he purposely intended through

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78 Kurz v. Collins, 6 Wis. 2d 538, 95 N.W.2d 365 (1959).
83 Western Cas. & Sur. Co. v. Weimar, 63 F.2d 635 (9th Cir. 1938).
85 111 F.2d 412 (8th Cir. 1940).
86 80 F.2d 470 (6th Cir. 1935).
false testimony to aid appellant in recovering a judgment against himself, eventually to be paid by appellee.\textsuperscript{87}

\textit{A. Family Relationships}

Considering the mobile nature of our society today, it is not surprising that the injured party would be a friend or relative of the insured, at least if a guest in the automobile. The ordinary friendly relationship between friends or members of a family group does not of itself furnish evidence of fraud or collusion.\textsuperscript{88}

In such a case where members of the family corruptly conspired and worked together to secure a recovery not justified by the facts, the policy should be and is avoided; but it is not avoided merely because the sympathy of the insured is with the injured members of his family rather than with the company which insured him, or because he does not suspend during litigation ordinarily friendly intercourse with his family. The iniquity is not whether the sympathy of the insured is with the plaintiff in the litigation, but whether he has failed to furnish proper assistance to the company in its defense of the suit or has entered into collusion with the plaintiff to establish liability unfairly. When such relationship exists, however, the conduct and testimony of the parties should be carefully scrutinized by the court and jury since the interest of the parties is not really adverse.\textsuperscript{89}

When, however, the friendly relationship between the parties is coupled with the elements of collusion, the insurer would not be liable under the policy.

His friendly relationship with appellant, his private conferences with her attorneys, both before and at the first trial, and his repeated admissions under oath that he had testified falsely upon first trial, concerning the vital issue of the case, leave little room for any other conclusion.\textsuperscript{90}

\textit{B. Voluntary Submission to Service of Process}

When the insured voluntarily and in collusion with the claimant submits to service of process in a jurisdiction where he would not otherwise be amenable to service, it is a breach of cooperation. It was so held in \textit{Mayflower Cas. Ins. Co. v. Osborne}\textsuperscript{91} where the insured permitted service upon himself in another jurisdiction because the attorneys retained by the insured for the injured parties, the insured's wife and stepdaughter, believed they had a better chance to recover against him in the other jurisdiction. However, if the insured enters the jurisdiction innocently and without collusion or if substituted service could be had, this would not be a lack of cooperation.\textsuperscript{92}

\textsuperscript{87}Id. at 472.
\textsuperscript{89}State Auto Mut. Ins. Co. v. York, 105 F.2d 730, 734 (4th Cir. 1939).
\textsuperscript{90}Storer v. Ocean Accident & Guarantee Corp., 80 F.2d 470, 472 (6th Cir. 1935).
\textsuperscript{91}326 F.2d 461 (4th Cir. 1964).
ASSUMPTION OF LIABILITY

The clause specifically requires that the insured shall not voluntarily assume any obligation. This problem usually arises immediately after an accident when the insured makes a written statement to the effect that he was at fault or admits liability. The court in *Kindervater v. Motorists Casualty Ins. Co.* stated:

> The insured's statement "I admit liability in the abovementioned accident" relieved the insurer from liability. An interpretation that would require a demonstration of substantial detriment to the insurer, as a result of the breach of such a condition, would seriously impair its practical efficacy.

However, the clause does not prevent the insured from making a truthful explanation to the claimant of the accident or of the circumstances regardless of its effect. Some courts, interpreting the clause somewhat differently, hold that there is a distinction between admitting fault and assuming liability. These courts state that assumption of liability means to contract an obligation.

It may be said that this is a distinction without a difference. We do not think so. To assume liability is to contract an obligation, whereas to admit fault is merely to admit the truth of a fact, from which liability may flow. There is nothing abhorrent in an insurer requiring that its assured shall not contract away the right to defend threatened litigation and to prohibit the assured from thus rendering certain the liability of the insurer. An insurer has a right to defend an action and to attempt to prove that there is no liability. This it cannot do if liability has already been assumed by its assured. But there is something contrary to our ideas as to what should be an established public policy for an insurer to require from an insured that he, the assured, shall not make a statement about the facts of an accident in which he may be involved. If it is contrary to public policy to prohibit the making of a statement, then surely it is contrary to public policy to require that, if a statement is made, it must be favorable under penalty of loss of insurance protection.

It appears that a majority of jurisdictions do not permit the distinction and look to the jury to decide the issue using the applicable material breach or prejudice standard.

WAIVER OF BREACH BY INSURER

The insurer must, upon discovery of a breach of the cooperation clause which it intends to rely upon in avoiding coverage, disclaim liability promptly. Unless this is done, a waiver of the breach will be effected. The insurer may not thereafter assert the breach. However,

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93 199 A. 606 (N.J.L. 1938).
94 Id. at 608.
the insurer could proceed to defend under a full reservation of rights. The insurer is also under a duty to know of the breach. In *Norwich Union Indem. Co. v. Haas*, the Illinois court held that an insurer waives its defense by continuing under a policy when it knows or in the course of ordinary events should have known the facts in question and the insurer is bound to have known if in the exercise of ordinary diligence it could have known. However, the continuation of a defense for an insured who had disappeared was held in *Durbin v. Lord* not to be a waiver where it had no definite knowledge of the reason.

**Duty of Insurer**

The cooperation clause specifically and impliedly places reciprocal duties upon both parties of the insurance contract. The insurer must take all reasonable steps to assure the assistance and cooperation of the insured. The problems in this area commonly arise when the insured disappears.

The problem of non-cooperation has a dual aspect: not only what the assured failed to do, but what the insurer on its part did to secure cooperation from an apathetic, inattentive, or vanished policy-holder, must be considered. Liability insurance is intended not only to indemnify the assured, but also to protect members of the public who may be injured through negligence. Indeed, such insurance is made mandatory in many states. It would greatly weaken the practical usefulness of policies designed to afford public protection if it were enough to show mere disappearance of the assured without full proof of proper efforts to locate him.

How much diligence must the insurer show? The answer to this question was given in two New York cases, which involved an insured that had disappeared, as follows:

1. Letters to all known addresses of the assured;
2. Letters to all known members of his family;
3. Inquiry at the Motor Vehicle Registry for licenses and registration information;
4. Voting records;
5. All employment sources for past and present employers to see whereabouts and references;
6. Running of a “skip trace” on the assured by a credit checking agency;
7. Application to all neighboring states’ Motor Vehicle Registries.

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99 179 F.2d 827 (7th Cir. 1950).
100 329 Ill. App. 333, 68 N.E.2d 537 (1946).
to determine if the assured has obtained a license or registration in those states;

(8) Checking of missing persons records of local and state police departments;

(9) Checking of the Department of Correction records to see whether the assured is in jail;

(10) Letters to state and federal tax authorities, and to the Department of Health, Education, and Welfare, to determine if they have a more recent address;

(11) Newspaper advertisements in local papers for at least one week;

(12) Checking on all other possible contacts, including union, political, religious, etc.

This is an enormous burden to place on the insurer and it is not suggested that this procedure be followed every time the insured has disappeared. However, if the company intends to base its disclaimer of coverage upon the disappearance, it would be well to follow the procedure.

All situations will not create the necessity of such a burdensome procedure. In *Barnes v. Pennsylvania Threshermen & Farmers' Mut. Ins. Co.*, the insured felt liability was so certain there was no necessity to appear. The court did not agree and stated that even in clear cases of liability, the presence of the insured may tend to mitigate against the amount of the verdict and the court held that this possibility made the voluntary and unexcused absence from trial of the insured a substantial and material lack of cooperation and should suffice to show prejudice in those jurisdictions where such a showing is required. In cases of this type therefore, little additional effort was required of the company. Each situation must therefore be evaluated on its facts and an application of the "good faith" doctrine applied.

**Compulsory Liability Insurance and Financial Responsibility Laws**

The advent of compulsory liability insurance and financial responsibility laws have had a decided effect upon the potential defense of lack of cooperation. Where the statutes creating compulsory insurance or financial responsibility have as their stated purpose the protection of the public, the insurer may not assert non-cooperation as a defense when sued by a member of the class sought to be protected. The language of the creating statute must be studied closely to determine its effect. This was illustrated in a recent case. The court held that the Arizona Financial Responsibility Law precluded the defense. The creating statute read as follows:

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104 146 So. 2d 119 (Fla. App. 1962).
106 State Farm Mut. Auto Ins. Co. v. Thompson, 372 F.2d 256 (9th Cir. 1967).
This policy may not be cancelled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurrence of the injury or damage, and no statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy.\(^{107}\) (emphasis added)

On the other hand the Illinois statute provides:

No such policy shall be cancelled or annulled as respects any loss or damage by any agreement between the carrier and the insured after said insured has become responsible for such loss or damage and any such cancellation or annulment shall be void.\(^{108}\) (emphasis added)

Under the Arizona statute the insurer was precluded from raising the defense. It is questionable if the same conclusion would be reached under the Illinois statute as any breach would occur prior to any determination of responsibility. However, some state financial responsibility laws permit the defense specifically.\(^{109}\) In compulsory liability insurance jurisdictions the law of the state has no extraterritorial effect so that an accident covered under a policy issued under the law which happens outside of the state would be subject to the defense.\(^{110}\) All that can be said here is to issue a note of caution to the attorney in jurisdictions subject to these laws of the potential problems which may be added to the case.

**Conclusion**

The cooperation clause, along with notice requirements, represent the main areas of concern to the insurer when it evaluates its right to disclaim coverage. The insured is equally concerned with the clause when he faces a trial or judgment and expects to be provided with a defense or coverage. While there are no clearly defined general rules which apply, the basic duty of each party to the insurance contract can be defined by the term "reasonable action." Each must do all that is within his power to help the other within the terms of the contract. Each factual situation has to be decided upon its own facts, but any reading of the case law in which the cooperation clause is at issue leads to but one conclusion—the imposition of a duty of good faith upon the parties in their dealings with one another.

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\(^{107}\) **ARIZ. REV. STAT. ANN.** § 28-1170(F) (1) (Supp. 1967).

\(^{108}\) **ILL. ANN. STAT.** ch. 95½, § 7-317(f) (2) (Smith-Hurd 1968).
