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LIABILITY INSURANCE—COOPERATION CLAUSE—FAILURE OF COOPERATION
ABSENT A FINDING OF PREJUDICE—Plaintiff insurance company sought a declaratory judgment absolving it from obligation on an automobile liability insurance policy on the ground that there had been a breach of the cooperation clause.¹ Johnston, the insured, was the driver of a car involved in an accident in Crawford County, Kansas, giving rise to substantial claims by defendant Elliott. At the request of Elliott's attorney, Johnston traveled from his home in Kansas to submit to service of process in Missouri. When plaintiff questioned this behavior, Johnston lied, denying that collusion had prompted his appearance in Missouri. On appeal from summary judgment for plaintiff company, *held*, affirmed, one judge dissenting. Where collusive service to which the insured would not otherwise be amenable is combined with outright falsehood, the cooperation clause must be deemed violated. *Elliott v. Metropolitan Casualty Ins. Co. of New York*, (10th Cir. 1957) 250 F. (2d) 680.

¹ "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." Principal case at 682, note 2.

The acknowledged purpose of the standard cooperation clause in liability insurance is to protect the insurer from the irresponsibility of the insured which may obstruct the defense of claims or from collusion resulting in fabricated claims.² Since failure of the insured to cooperate releases the insurer from liability, generally to the detriment of the injured third party,³ it is consistently held that the non-cooperation must be of a material and substantial nature before a violation will be found.⁴ The courts are in disagreement, however, as to whether prejudice to the interests of the insurer must also be shown.⁵ Because the injured third party may have no way of forcing the insured to cooperate with the insurer⁶ and because of possible collusion between the insured and insurer to simulate non-cooperation, most courts require the insurer to show that lack of cooperation adversely affected its position in the defense of the pending claim.⁷ On the other hand, some courts contend that there exists an equal likelihood of collusion between the claimant and the insured⁸ and will regard acts of non-cooperation as inherently prejudicial⁹ or hold the question of prejudice immaterial since it is not within the written terms of the insurance contract.¹⁰ Applicable Kansas law intimated an acceptance of the "prejudice required" rule,¹¹ as did prior Tenth Circuit precedent.¹² Thus

² 8 APPLEMAN, *INSURANCE LAW AND PRACTICE* 151 (1942). See also 6 BLASHFIELD, *CYC. AUTOMOBILE LAW AND PRACTICE*, perm. ed., pt. 2, §4059 (1945).

³ It is often the case that the insured is insolvent or bankrupt, and redress, if any, will have to be sought from the insurer. See generally the cases collected in 72 A.L.R. 1446 (1931), supplemented by 98 A.L.R. 1465 (1935) and 139 A.L.R. 777 (1942).

⁴ *General Accident Fire and Life Assur. Co. v. Rinnert*, (5th Cir. 1948) 170 F. (2d) 440 at 441.

⁵ See discussion in *State Farm Mutual Automobile Ins. Co. v. Palmer*, (9th Cir. 1956) 237 F. (2d) 887 at 891.

⁶ *Hynding v. Home Accident Ins. Co.*, 214 Cal. 743, 7 P. (2d) 999 at 1002 (1932).

⁷ VANCE, *INSURANCE*, Anderson ed., 1003 (1951).

⁸ *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271 at 275, 160 N.E. 367 (1928). This opinion by Cardozo has become standard authority for courts following the minority view.

⁹ 1950 WASH. UNIV. L. Q. 235 at 235, 238.

¹⁰ Joseph, "The Cooperation Clause in Liability Policies," 72 U.S. L. REV. 372 at 382, 383 (1938). Some correlation may be found between the requirement for prejudice and a court's interpretation of the cooperation clause as a condition precedent or a condition subsequent in the insurance contract. See O'Kelley, "The Cooperation Clause as a Condition Precedent," 17 INS. COUNS. J. 27 (1950).

¹¹ *Jameson v. Farmers Mutual Automobile Ins. Co.*, 181 Kan. 120, 309 P. (2d) 394 (1957). The majority opinion in the principal case distinguishes this authority as persuasive only in cases where the voluntary disappearance of the insured prior to trial is involved, for then the injured third party is in a helpless position against collusion between the insured and insurer. Principal case at 684.

¹² "Under the weight of authority, to constitute a breach of a cooperation clause by the insured, there must be a lack of cooperation . . . that results in prejudice to the insurer. . . ." *State Farm Mutual Automobile Ins. Co. v. Koval*, (10th Cir. 1944) 146 F. (2d) 118 at 120. But see *United States Fidelity & Guaranty Co. v. Wyer*, (10th Cir. 1932) 60 F. (2d) 856. The Koval case, however, is similar on its facts to *Jameson v. Farmers Mutual Automobile Ins. Co.*, note 11 supra, and apparently is distinguishable for the same reason.

the district court in this case felt constrained to find prejudice.¹³ Moreover, the dissenting appellate judge argued for reversal solely because of a complete absence of prejudice on the facts.¹⁴ However, the majority withheld comment on whether a finding of prejudice was necessary, or whether it had in fact occurred. While recognizing that collusive submission to service may be permissible where service on a party could otherwise be obtained,¹⁵ the court felt that in this case Johnston would not otherwise have been amenable to service in Missouri. Therefore his activities and lies were in furtherance of the claimant's objectives rather than the insurer's, and constituted a violation of the cooperation clause.¹⁶

It is difficult to tell whether the court is renouncing completely the rule requiring prejudice, or is creating an exception to the rule limited to the facts of this case. If it is the latter, the court's decision is salutary. Since the public policy behind the rule is to protect the injured third party from collusion, there is little reason to demand a showing of prejudice when it is he and not the insurer who is indulging in collusion. If the court is renouncing the rule requiring prejudice, then the court's decision is questionable for it fails to take into account the shifting function of automobile insurance. Once it was a contract of indemnity for the protec-

¹³ "[The insurer], rather than [the insured], had the right to determine whether it was advantageous to try such actions as might be instituted against him in the court of his domicile or in some other." *Metropolitan Cas. Ins. Co. of New York v. Johnston*, (D.C. Kan. 1956) 146 F. Supp. 5 at 8. Whether a denial to the insurer of the choice of forum still constitutes prejudice is questionable in light of *National Farmers Union Property & Cas. Co. v. Tucker*, (10th Cir. 1957) 247 F. (2d) 858.

¹⁴ The service of process in Missouri had been quashed on the ground of forum non conveniens. *Elliott v. Johnston*, 365 Mo. 881, 292 S.W. (2d) 589 (1956). Elliott then obtained service upon Johnston in Bourbon County, Kansas, the residence of Johnston and the place where the insurer desired the action to be brought. However, to say there is a lack of prejudice overlooks the fact that the insurer could possibly have had a more favorable opportunity to negotiate a settlement prior to the expensive litigation in Missouri if Elliott had been forced to proceed originally in a jurisdiction which was evidently undesirable to his attorney. See note 1 supra: "The Insured . . . shall assist in effecting settlements. . . ."

¹⁵ *Marcum v. State Automobile Mutual Ins. Co.*, 134 W.Va. 144, 59 S.E. (2d) 433 (1950). There is no other case squarely in point with the facts of the principal case, and little authority on the service of process problem generally. See *Ohio Cas. Ins. Co. v. Beckwith*, (5th Cir. 1934) 74 F. (2d) 75 (personal service waived and appearance voluntarily entered); *Metropolitan Cas. Ins. Co. of New York v. Richardson*, (S.D. Ill. 1948) 81 F. Supp. 310 (interference with the defense in addition to collusive submission to service); *Glade v. General Mutual Ins. Assn. of Des Moines*, 216 Iowa 622, 246 N.W. 794 (1933) (voluntary acceptance of service after original service lapsed); *Ems v. Continental Automobile Ins. Assn.*, (Mo. App. 1926) 284 S.W. 824 (non-collusive submission to service); *Buckner v. General Cas. Co.*, 207 Wis. 303, 241 N.W. 342 (1932) (interference with the defense in addition to submission to service). See also *National Farmers Union Property & Cas. Co. v. Tucker*, note 13 supra.

¹⁶ Principal case at 684. Collusion between the injured third party and the insured is generally for the purpose of creating unwarranted claims, and lying by the insured generally involves misrepresentation of the facts of the accident. See, e.g., 34 A.L.R. (2d) 264 (1954). But here, the claim was valid and the facts of the accident undistorted. However, the breach was at least material in terms of bad faith by the insured.

tion of the insured, but today it is a contract of liability, and public policy demands its enforcement on behalf of innocent third parties.¹⁷ The climax of this transition is seen in the advent of compulsory automobile liability insurance,¹⁸ a legislative acknowledgment that insurance is for the benefit of the public at large.¹⁹ It would seem inconsistent with the trend, therefore, for a court to adopt a line of authority likely to obstruct recovery against the insurer. However, the answer to whether the decision in the principal case marks a justifiable exception to the majority rule, or an acceptance of a minority view which fails to recognize modern insurance theory must await a more definitive statement by the Tenth Circuit.

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¹⁷ For a step-by-step review of the shift, see James and Thornton, "The Impact of Insurance on the Law of Torts," 15 LAW AND CONTEMP. PROB. 431 (1950).

¹⁸ In 1956 New York became the second state to adopt compulsory automobile liability insurance. 62-A N.Y. Consol. Laws (McKinney, 1952; Supp. 1957) §§93 to 93-k. See also Mass. Laws Ann. (1948) c. 175, §113A.

¹⁹ 15 BOST. UNIV. L. REV. 551 at 552 (1935). See also the dissent in *Valladao v. Fireman's Fund Indemnity Co.*, 13 Cal. (2d) 322 at 338, 89 P. (2d) 643 (1939). The Massachusetts legislation specifically prohibits the insurer from setting up the defense of lack of cooperation against an injured third party. *Vance v. Burke*, 267 Mass. 394, 166 N.E. 761 (1929). Although this type of provision is absent in the New York statute, the presence of a legislative declaration of policy in favor of the injured third person may compel the New York courts (see note 8 supra) at least to accept the "prejudice required" rule. 32 N.Y. UNIV. L. REV. 147 at 167 (1957).