

Can't We All Just Get Along? The Duty to Cooperate

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Cooperation, teamwork, and responsiveness are concepts that are valued in American society. These concepts are lauded in literature and movies, schools, and workplaces, and the absence of these values is often derided, e.g. the American political landscape. In the insurance context, the duty of an insured to cooperate with the insurance company after a claim has been initiated is explicitly stated in most liability policies. As noted by the Court in *Staples v. Allstate Ins. Co.*, 176 Wash. 2d 404, 411, 295 P.3d 201, 205 (2013), "Cooperation is essential to the insurance relationship because that relationship involves a continuous exchange of information between insurer and insured interspersed with activities that affect the rights of both. The relationship can function only if both sides cooperate."

According to Couch on Insurance, "The main purpose of a cooperation clause is to prevent collusion while making it possible for the insurer to make a proper investigation. In addition, the purpose of a cooperation clause is to enable the insurer to obtain relevant information concerning the loss while the information is fresh, to enable it to decide upon its obligations, and to protect itself from fraudulent and false claims. Accordingly, a cooperation clause requires honest cooperation and telling the truth."¹

The insured's duty to cooperate generally extends to providing information critical to the investigation of the claim, providing testimonial evidence, otherwise cooperating in the defense against the claim, and acting in a way so as not to compromise the resolution of the claim.² The duty to cooperate arises from the inclusion of a cooperation clause in the policy of insurance. Because this cooperation can fairly be characterized as a duty, the failure to comply can result in the loss of coverage under the policy.³

However, the termination or voiding of coverage by an insurer due to the failure to cooperate requires a substantial showing in order to avoid claims of bad faith or statutory violation. The standard by which coverage can be terminated due to the failure to cooperate varies depending upon the jurisdiction, but there are some common general predicates to consider. Preliminarily, the insurer's request for cooperation must be reasonable and must be clearly communicated to the insured. Because the standard for declination of coverage is so often intentional failure on the part of the insured to cooperate, a prudent insurer will communicate its request for cooperation in clear and unequivocal terms. For example, where the insurer is requesting the production of documentation or cooperation in depositions, such request should be clearly delineated to the insured in writing at an address where the insurer knows the insured receives mail. Further, the consequences of the failure

to cooperate – the termination of coverage – should also be clearly communicated to the insured. Where the insurer anticipates a breach of the insured’s duty to cooperate, the request for cooperation and the consequence for a breach should be communicated in no uncertain terms and the insurer must be diligent in its attempts to communicate these messages.⁴

In order to demonstrate that an insured has failed to cooperate – after reasonable communications of the insurer’s request for cooperation – most jurisdictions require the insurer demonstrate both an intentional failure to cooperate and actual prejudice to the insurer’s interests. The West Virginia case of *Bower v. Thomas*, 188 W. Va. 297 (1992) illustrates these requirements in the third-party context of a liability policy. In *Bower*, the insured, David Thomas, and William Bowyer were involved in a single car accident where Mr. Bowyer was severely injured. Mr. Bowyer, who was a minor at the time of the incident, initiated a claim against David Thomas who, in turn, tendered the claim to his insurer, Aetna Casualty & Surety Co. (“Aetna”). Aetna retained a local attorney to defend Mr. Thomas, who attempted to contact Mr. Thomas but was unable to reach him prior to filing an Answer to the Complaint. Despite an initial meeting after the filing of the Answer, Mr. Thomas would only occasionally respond to requests from his counsel.

Subsequently, Aetna attempted to arrange for a deposition of its insured. When Mr. Thomas failed to appear for the deposition, Aetna’s claim representative sent a letter to his mother’s residence (his last known address) advising that if Mr. Thomas failed to cooperate in the future, Aetna would “conduct any investigation or activity in connection with the case under a full reservation of the Company’s rights.” The letter did not inform Mr. Thomas that his failure to cooperate may relieve Aetna of its duty to defend the lawsuit. Subsequently, Mr. Thomas contacted the insurance representative to advise of his move to California and his willingness to attend a deposition. The insurance representative re-sent his letter to Mr. Thomas at his mother’s address again regarding his failure to appear for a deposition in Fayetteville, West Virginia, where the case was pending. This letter again failed to inform Mr. Thomas of the consequences of his lack of cooperation.

According to an Affidavit submitted by the insurance representative, several attempts were made to contact Mr. Thomas via telephone, but were unsuccessful. During the one conversation where the representative was able to reach Mr. Thomas, Aetna advised him that it was denying coverage because he had failed to cooperate. This denial of coverage was communicated to Mr. Bowyer’s counsel the same day. Thereafter, Mr. Bowyer’s counsel filed a declaratory judgment action seeking to challenge the declination of coverage.

The Supreme Court of Appeals of West Virginia, reviewing the insured’s duty of cooperation under these facts, announced the following test for the voiding of a policy of insurance: “Before an insurance policy will be voided because of the insured’s failure to cooperate, such failure must be substantial and of such nature as to prejudice the insurer’s rights.” *Id.* at Syl. Pt. 1. Moreover, “[i]n addition to prejudice, the insurer must show that its insured willfully and intentionally violated the cooperation clause of the insurance policy before it can deny coverage.” *Id.* at Syl. Pt. 2. Most significantly, the Court determined that the insurer bears the burden of proof on its claim that the insured failed to cooperate, triggering the voiding of the policy of insurance. *Id.* at Syl. Pt. 4.

These principles were predicated on the substantial policy that “[a]utomobile liability insurance is chiefly designed for the benefit of third parties injured by a negligent driver.” *Id.* at 302. The Court explained that allowing an insurer to decline coverage because of the alleged failure to cooperate would “unduly expose innocent injured members of the public to financial ruin and provide an unjustifiable windfall to the prejudiced insurer.” *Id.* Again, these principles were espoused in the third-party context.

Applying these principles to the facts of the case, the Court determined that Aetna failed to meet its burden of proof to demonstrate Mr. Thomas' intentional failure to cooperate with the defense against the Bowyer claim. Notwithstanding Aetna's production of multiple letters attempting to seek Mr. Thomas' cooperation with the claim, the Court emphasized that neither letter clearly and unequivocally stated that the continued failure to respond would result in the loss of insurance. Even more significantly, Aetna presented no evidence that it was prejudiced by the lack of communication from Mr. Thomas. There was no adverse judgment entered and no indication that the plaintiff moved for sanctions as a result of Mr. Thomas' non-appearance at deposition. Consequently, the Supreme Court concluded that because Aetna failed to prove the necessary elements to entitle it to void its policy of insurance, the trial court was directed to enter an order of judgment in favor of the plaintiff, finding that the involved automobile insurance policy was not voided.

While the Supreme Court of Appeals of West Virginia did not find justification to void coverage in Bowyer, the Court of Appeals of Maryland did find a breach of the cooperation duty in the third-party case of Allstate Insurance Company v. State Farm Mutual Automobile Insurance Company, 363 Md. 106 (2001). In the Maryland case, State Farm Insurance Company ("State Farm") issued a policy to its insured, Latricia Kirby, which included a clause requiring Ms. Kirby, among other things, to "cooperate with us and, when asked, assist us in: a. making settlements; b. securing and gathering evidence; [and] c. attending and getting witnesses to attend hearings and trials." *Id.* at 108. After the issuance of the policy, Ms. Kirby was involved in an automobile accident, and two claims were made against her.

After suit was filed and allegations of negligence were directed to Ms. Kirby, State Farm assigned defense counsel to represent her interests. Shortly thereafter, Ms. Kirby got married, moved from the state of the accident across the country, and washed her hands entirely of the matter. Despite communications from her counsel notifying her of scheduled depositions, Ms. Kirby refused to attend. She also refused to cooperate with the response to discovery requests served by the other parties. State Farm retained an investigator, who communicated at various points with Ms. Kirby's father, her sisters, her husband, and her employer in order to seek her cooperation with the defense, all to no avail. Consequently, State Farm's Claim Superintendent wrote to Ms. Kirby advising her that, if she continued to ignore the requests for assistance, State Farm "may refuse to protect her and she may be liable for any judgment rendered against her." *Id.*, 363 Md. at 112. Her counsel also confirmed this in writing.

After several hearings, the Court granted Ms. Kirby a definite period of time to respond to discovery requests or face an order preventing her from introducing evidence in her defense. After this period expired, the order was entered precluding Ms. Kirby from introducing any evidence concerning her defenses to the allegations of negligence.

Notwithstanding these developments, State Farm continued to attempt to communicate with Ms. Kirby, notifying her of the trial date and advising it would pay for her travel, food, and lodging to attend the trial. Additionally, State Farm advised that, despite the preclusion order, the plaintiff had indicated a willingness to permit her to present evidence if she would appear to testify at this matter. Ms. Kirby nonetheless failed to appear, and the jury determined her to be liable for the incident.

After the determination on liability, the plaintiff filed a declaratory judgment action against State Farm disputing State Farm's declination of coverage on the basis that Ms. Kirby had failed to cooperate. This claim was adjudicated before the trial court with the presentation of substantial evidence related to State Farm's efforts to communicate with Ms. Kirby to secure her cooperation. In its appellate review of this matter, the Court of Appeals first looked to § 19-110 of the Maryland Insurance Article,

which provided: “An insurer may disclaim coverage on a liability insurance policy on the ground that the insured or a person claiming the benefits of the policy through the insured has breached the policy by failing to cooperate with the insurer or by not giving the insurer required notice only if the insurer establishes by a preponderance of the evidence that the lack of cooperation or notice has resulted in actual prejudice to the insurer.” *Id.* at 122.

The Court then turned its analysis to what constitutes “actual prejudice” and whether State Farm had satisfied this standard under the facts of the Kirby case. The Court reasoned that the “proper focus should be on whether the insured’s willful conduct has, or may reasonably have, precluded the insurer from establishing a legitimate jury issue of the insured’s liability, either liability *vel non* or for the damages awarded.” *Id.* at 127-28. In applying this standard to the behavior demonstrated by Ms. Kirby, the Court concluded that State Farm met its burden to demonstrate actual prejudice. As the Court commented, “[t]he prejudice here, of course, goes beyond merely the loss of Kirby’s testimony. By reason of her willful failure to cooperate in providing discovery – her refusal to attend her twice-scheduled deposition or cooperate in a further rescheduling of it, her refusal to assist in responding to properly filed interrogatories and demands for documents – and her refusal to attend trial, State Farm was precluded from offering any evidence in defense of the claim. . . . Unquestionably, under a Davies-type standard, there was actual prejudice.” *Id.* at 128. The prejudice was not in how the jury would view the evidence; rather, the prejudice arose from the fact that State Farm was prevented from presenting any defense against the claims. For these reasons, the Court concluded that State Farm met its burden and remanded the case for further proceedings consistent with its opinion.

Other courts reviewing the cooperation clause in the first-party context have concluded that the clause is binding not only on the primary insured but also on all named and additional insureds⁵ and their estates.⁶ The case of *Lockwood v. Porter*, 98 N.C.App. 410, 390 S.E.2d 742 (1990) illustrates this principle. In *Lockwood*, Plaintiff Clifford Daniel Lockwood received permission to operate a vehicle owned by Janice G. McGlen and insured by Aetna Casualty & Surety Company (“Aetna”). Mr. Lockwood was injured in a collision caused by Defendant Ben Porter, Jr., an uninsured motorist. Aetna answered the suit for uninsured motorist benefits and subsequently moved for summary judgment on the basis of Mr. Lockwood’s failure to cooperate.

During the summary judgment hearing, Aetna presented the court with its policy language stating, in pertinent part:

A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
3. Submit, as often as we reasonably require, to physical exams by physicians we select. We will pay for these exams.

Lockwood, 98 N.C. App. at 411, 390 S.E.2d at 743. The parties further agreed that Mr. Lockwood “refused to appear for a doctor’s appointment that Aetna scheduled under the foregoing policy.” *Id.* In an affidavit presented to the Court, Mr. Lockwood stated that “Aetna made an appointment for him to be examined . . . by Dr. John Roper, an orthopedic physician; he failed to keep the appointment because he did not want to waste his time with a doctor who was not going to do anything for him and would report to Aetna that nothing was wrong with him when that was not so; and he thought the whole situation was a rip off.” *Id.*

In granting summary judgment to Aetna, the Court concluded that the cooperation clause was binding on Mr. Lockwood “as an additional insured operating an automobile with the permission of the insured.” The Court determined that Aetna’s right to have Mr. Lockwood examined by a physician was a “material part of the insurance contract, and [his] unjustified refusal to be so examined violated the cooperation clause of the policy and bar[red] his action as a matter of law.” *Id.* (quoting *Orozco v. State Farm Mutual Insurance Co.*, 360 F.Supp. 223 (S.D. Fla. 1972), *aff’d*, 480 F.2d 923 (5th Cir. 1973)). Where Mr. Lockwood improperly failed to cooperate, Aetna’s defense was established as a matter of law and the dismissal was affirmed.

Where the question of whether an insured has (or has not) failed to cooperate in the investigation or defense of a claim under a liability policy involves such a high and potentially complex burden of proof, consultation with an attorney versed in the specifics of the jurisdiction governing the policy of insurance is essential. Contact a member of the Insurance Company Team with any questions about insureds under your policy.

1 COUCH ON INSURANCE, 3d Ed., § 199:4 (internal citations omitted).

2 See, e.g., *Woznicki v. GEICO General Ins. Co.*, 216 Md. App. 712, 732, 90 A.3d 498, 509 (2014), *aff’d*, 443 Md. 93, 115 A.3d 152 (2015) (“Generally, an insured’s duty to cooperate includes the obligation to make a fair, frank and truthful disclosure to the insurer for the purpose of enabling it to determine whether or not there is a defense, and the obligation, in good faith, both to aid in making every legitimate defense to the claimed liability and to render assistance at trial.”) (internal citations omitted).

3 See, e.g., *Verdetto v. State Farm Fire and Cas. Co.*, 837 F. Supp. 2d 480, 484-85 (M.D. Pa. 2011), *aff’d*, 510 Fed. Appx. 209 (3d Cir. 2013) (Insured forfeited right to coverage following a fire loss because it failed to produce telephone and financial records that the insurer had reasonably requested after an arson fire.); *Wingates, LLC v. Commonwealth Ins. Co. of America*, 2014 WL 2048501 (E.D. N.Y. 2014) (violation of the obligation to cooperate constituted a material breach of the insurance contract and a defense to indemnification under the policy).

4 See, e.g., *Brookins v. State Farm Fire and Cas. Co.*, 529 F. Supp. 386, 392 (S.D. Ga. 1982) (insured’s failure to submit to examination under oath held not to constitute bar to coverage because insurer did not specifically designate the person to take the examination or the time and place of the examination); *Soft America, Inc. v. Ins. Co. of N. Am.*, 155 Ga. App. 400, 271 S.E.2d 641 (1980) (insured excused from complying with insurer’s request for examination because insurer did not, as required by policy, specifically designate the time and place for such examination).

5 *State Farm Mut. Auto. Ins. Co. v. Burden*, 115 Ga. App. 611, 155 S.E.2d 426 (1967) (additional insured owes duty to cooperate with automobile liability insurer to same extent and same degree as named insured); *St. Paul Fire & Marine Ins. Co. v. Gordon*, 116 Ga. App. 658, 158 S.E.2d 278 (1967) (insured has obligation to cooperate under automobile liability policy); *Wolverine Ins. Co. v. Sorrough*, 122 Ga. App. 556, 177 S.E.2d 819 (1970) (omnibus insured is bound by cooperation clause under automobile liability policy); *Gianinni v. Bluthart*, 132 Ill. App. 2d 454, 270 N.E.2d 480 (1st Dist. 1971) (omnibus insured has same obligation and duty to cooperate as does named insured under automobile liability policy); *M. F. A. Mut. Ins. Co. v. Cheek*, 34 Ill. App. 3d 209, 340 N.E.2d 331 (5th Dist. 1975), *aff’d*, 66 Ill. 2d 492, 6 Ill. Dec. 862, 363 N.E.2d 809 (1977) (permissive users who attain the position of an additional insured under the omnibus clause are required to comply with the terms of the cooperation clause); *Perry v. Saleda*, 34 Ill. App. 3d 729, 340 N.E.2d 314 (3d Dist. 1975); *Lockwood v. Porter*, 98 N.C. App. 410, 390 S.E.2d 742 (1990) (cooperation clause of automobile

liability policy binding on claimant who operated insured's automobile with insured's permission, and sought coverage under policy for injuries suffered in accident with uninsured motorist).

6 See, e.g., *Weschler v. Carroll*, 396 Pa. Super. 41, 578 A.2d 13 (1990) (Administratrix of insured's estate assumes same duties and obligations that insured would have had under cooperation clause of automobile liability policy, which administratrix had to fulfill in order to maintain estate's right to be indemnified under policy).

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