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Vincent A. Siano

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surety a *complete* defense when the creditor acts in such a way as to create an undue risk that the principal will not perform, whereas under the partial failure interpretation, the defense being pro tanto, the surety in many cases will still have to respond to the creditor when, perhaps in good sense, this should not be required.

STUART L. POTTER

Insurance—Cooperation Clause—Waiver of Breach Extending to All Claims.—*Mayflower Ins. Co. v. Osborne.*[1]—This is an action for declaratory judgment by the insurer to determine its liability under an automobile insurance policy in relation to three Tennessee state court judgments rendered against it. The policy in question was issued, under the laws of Virginia, to Alice Roe Osborne as the named insured and owner of the automobile. The insured and her daughter were injured in a collision in Kentucky while passengers in the car which was being driven by the named insured's husband with her consent. The driver of the other car was also injured. By a pre-arranged agreement with attorneys representing Alice Roe Osborne and the daughter, the husband submitted himself to the jurisdiction of the courts of Tennessee. Since the accident occurred in Kentucky, and the Osbornes resided in Virginia, this was the only way jurisdiction could have been obtained in Tennessee. Immediately upon learning of this collusive service, the insurer brought the present action alleging that the submission to service of process was a breach of the policy's cooperation clause.[2] Subsequently, the insurer requested and secured the Osbornes' full cooperation in defending suits brought by the other driver in Kentucky. The insurer still claims the breach as a defense to the Tennessee judgments. HELD: The cooperation of the insured was a condition precedent to any liability on the part of the insurer, and a failure of the condition completely voided the insurance contract. However, by seeking and receiving the cooperation in the defense of the suit brought in Kentucky, the insurer waived its rights to assert the breach as a defense in *any* action resulting from the accident.

Provisions for the cooperation of the insured with the insurer in settling or litigating claims arising under the policy have universally been held effective and enforceable, and are generally considered a material part of the insurance contract.[3] The purpose of such a clause is to prevent *collusion* between the insured and the injured party to the detriment of the insurer.[4]

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[1] 216 F. Supp. 127 (W.D. Va. 1963).

[2] The policy contained a standard cooperation clause:

> The insured shall cooperate with the company and, upon the company's request, attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceeding in connection with the subject matter of this insurance.

Supra note 1, at 129, n.1.

[3] Potomac Ins. Co. v. Stanley, 281 F.2d 775 (7th Cir. 1960); Tillman v. Great Am. Indem. Co., 207 F.2d 588 (7th Cir. 1953); Horton v. Employers' Liab. Assur. Corp., 179 Tenn. 526, 164 S.W.2d 1016 (1942).

[4] E.g., American Auto. Ins. v. Fidelity & Cas. Co., 159 Md. 631, 152 Atl. 523 (1930).

The material lack of cooperation on the part of the insured is often considered a breach of a condition precedent eliminating liability on the part of the insurer. In such instances, the insurer need not show prejudice from the breach.[5] Other courts have held that the non-occurrence of the condition acts as a condition subsequent terminating the insurer's liability on claims which have already arisen.[6]

Some courts, dissatisfied with the application of classical contract theory to the field of insurance, have required a showing of substantial prejudice to the insurer from the insured's lack of cooperation.[7] Other courts seem to favor a middle ground, namely, a showing of a material and substantial lack of cooperation which is considered inherently prejudicial.[8] Whatever the view of the particular jurisdiction, it is generally held that the cooperation clause imposes reciprocal obligations, *i.e.*, both the insured and the insurer must exercise diligence and good faith in giving and securing cooperation respectively.[9] Following a breach of a cooperation clause the insurer may elect to cancel the policy,[10] to set up the breach in an action brought against it,[11] or to continue to act pursuant to the policy with a full reservation of its rights.[12]

The hardship of denying recovery to an injured person, because of lack of cooperation on his part, is greatly lessened by a liberal application of the doctrines of waiver and estoppel.[13] Included within the ambit of those acts which have been held to amount to a waiver of such a breach, or to an estoppel from asserting it, are the defending or the continuing defense of an action brought against the insured.[14]

The principles applied in deciding the *Mayflower* case are those which have been established by Virginia case law.[15] These authorities regard the cooperation of the insured as a condition precedent to the liability of the insurer. The company need show only a material and substantial lack of cooperation, and it is immaterial whether the insurer has been prejudiced by the breach. The district court, under the doctrine of *Erie R.R. v. Tompkins*,[16] was bound to apply these principles to the present case, although implicitly expressing disapproval in its so doing.[17] The court might well

[5] New Jersey Fid. & Plate Glass Ins. Co. v. Love, 43 F.2d 82 (4th Cir. 1930); Polito v. Galluzzo, 337 Mass. 360, 149 N.E.2d 375 (1958).

[6] Bean v. State Farm Mut. Auto. Ins. Co., 269 F.2d 151 (6th Cir. 1959); Houran v. Preferred Acc. Ins. Co., 109 Vt. 258, 195 Atl. 253 (1937).

[7] E.g., Cameron v. Berger, 336 Pa. 229, 7 A.2d 293 (1938).

[8] Fischer v. Western & Southern Indem. Co., 106 S.W.2d 490 (Mo. App. 1937).

[9] Royal Indem. Co. v. Rexford, 197 F.2d 83 (5th Cir. 1952); Imperiali v. Pica, 338 Mass. 494, 156 N.E.2d 44 (1959).

[10] Quisenberry v. Kartsonis, 297 S.W.2d 450 (Mo. 1956).

[11] Glade v. General Mut. Ins. Ass'n, 216 Iowa 622, 246 N.W. 794 (1933).

[12] Travelers' Indem. Co. v. Hollinian, 174 Miss. 220, 164 So. 36 (1935).

[13] E.g., Indemnity Ins. Co. of North America v. Forrest, 44 F.2d 465 (9th Cir. 1930); Goergen v. Manufacturers Cas. Ins. Co., 117 Conn. 89, 166 Atl. 757 (1933).

[14] E.g., Dehart v. Illinois Cas. Co., 116 F.2d 685 (7th Cir. 1941); Ziegler v. Ryan, 66 S.D. 491, 285 N.W. 875 (1935).

[15] State Farm Ins. Co. v. Arghyris, 189 Va. 913, 55 S.E.2d 16 (1949).

[16] 304 U.S. 64 (1938).

[17] "Regardless of how this court may feel about the propriety of applying classic contract principles to modern insurance contracts . . : the language of the Virginia court is clear and unequivocal." Supra note 1, at 131.

have recognized that the factual situation in *Mayflower* differs from those cases to which the principles had previously been applied.

The courts have many times considered the cooperation clause in a liability insurance policy as a protection for the insurer from collusion between the insured and the injured party;[18] yet the doctrines of waiver and estoppel will be liberally applied to further the public policy of compensating the injured.[19] Even though the insured has cooperated in the defense of one claim arising out of an accident, it is difficult to see how this operates as a waiver as to another claim where there has been a collusive submission to jurisdiction. With regard to these latter claims, the protection of the cooperation clause is still quite relevant. In the cases establishing the legal effect of a breach and subsequent waiver, the courts were dealing with situations in which the lack of cooperation extended to *all* claims covered under the insurance contract. Therefore, any waiver extended as far as the breach itself did—to *all* the claims. It is apparent that in factual situations such as the one presented in the instant case, multiple claims and several injured parties being present, the insurer can still be protected from collusion between the insured and any one injured party, and at the same time another injured person may recover when his own situation entitles him to compensation.

VINCENT A. SIANO

Labor Law—Agency Shop Agreements—Valid under NLRA—Subject to State Law.—***NLRB v. General Motors Corp.;***[1] ***Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn.***[2]—The Supreme Court recently handed down two decisions dealing with the agency shop.[3] The first case originated shortly after Indiana ruled that an agency shop agreement did not violate its right-to-work law.[4] The United Auto Workers Union (UAW) asked General Motors to negotiate for an agency shop provision to cover the Company's plant in Indiana.[5] The Company refused, claiming that an agency

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[18] Supra note 4.

[19] Supra note 13.

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[1] 373 U.S. 734 (1963).

[2] 373 U.S. 746 (1963). Preemption issue decided on reargument, 84 Sup. Ct. 219 (1963).

[3] As used in this note the term agency shop refers to a union-security arrangement under which all employees, as a condition of employment, are required to pay union dues and initiation fees but need not join the union.

[4] Meade Elec. Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 408 (1959). The Indiana right to work law renders unenforceable any agreement conditioning employment upon union membership.

[5] A 1958 nationwide agreement between the UAW and General Motors provided for a union shop arrangement. However, these provisions were not operative in states like Indiana where state law prohibited making union membership a condition of employment. After the *Meade* decision, the UAW proposed that General Motors amend the agreement so as to condition employment in the Indiana plant on the payment by employees to the union of sums equal to the initiation fees and periodic dues paid by union members. Union membership was left to the option of the employees.