Insurance—Cooperation Clause—Waiver of Breach Extending to All Claims.— Mayflower Ins. Co. v. Osborne

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.*—This is an action for de-
claratory judgment by the insurer to determine its liability under an auto-
mobile 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 in-
jured. 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. Subse-
quently, 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 co-
operation 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. The purpose of such a clause is to prevent *collusion*
between the insured and the injured party to the detriment of the insurer.

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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.
3 Supra note 1, at 129, n.l.
4 E.g., 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).
CASE NOTES

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


\(^7\) 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).


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


\(^12\) 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).


\(^16\) 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; yet the doctrines of waiver and estoppel will be liberally applied to further the public policy of compensating the injured. 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.; Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn.*—The Supreme Court recently handed down two decisions dealing with the agency shop. The first case originated shortly after Indiana ruled that an agency shop agreement did not violate its right-to-work law. The United Auto Workers Union (UAW) asked General Motors to negotiate for an agency shop provision to cover the Company's plant in Indiana. The Company refused, claiming that an agency

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18 Supra note 4.
19 Supra note 13.

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.
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.