FirstLook

Issues and Developments in Insurance Law

Letter from the Insurance Company Team

"An insured owes an obligation to cooperate with its insurer. Generally, this duty to cooperate flows from a specific provision in the insurance contract, usually referred to as the 'cooperation clause.'"[1] However, even if the duty to cooperate is not expressly set forth in the policy, it is an implied condition precedent to coverage.[2]

> **From the insurance company's standpoint, the cooperation clause serves to assist the insurance company to (i) obtain information concerning a loss while the information is still fresh; (ii) determine its obligations to indemnify the loss and/or defend its insured; (iii) protect itself from fraudulent claims; and (iv) pursue a subrogation claim against a responsible third-party, if applicable. Where a third-party claimant is involved, the cooperation clause also serves to prevent collusion between the policyholder and the claimant.[3]**

The articles in this issue highlight the duty to cooperate in both the first-party and third-party contexts. What does the duty to cooperate entail? How does an insured's Fifth Amendment privilege against self-incrimination impact an insured's duty to cooperate? What are the potential pitfalls in claiming lack of coverage based upon an insured's failure to cooperate? The articles herein will provide you with a "FirstLook" at the duty to cooperate.

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[1] § 36:2. Overview of the cooperation clause—Standard contract language, 3 LAW AND PRAC. OF INS. COVERAGE LITIG. § 36:2.

[2] *See, e.g., First Bank of Turley v. Fidelity & Deposit Ins. Co. of Maryland*, 928 P.2d 298 (Okla. 1996) (the duty to cooperate is both contractual and implied as a matter of law).

[3] Rick Virnig, *The Insured's Duty to Cooperate*, 6 J. TEX. INS. L. 11 (2005); see also 14 COUCH ON INS. § 199:1 Overview of Duty.

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Stop! Cooperate, and Listen...

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

By: Chelsea Brown Prince

"The only thing that will redeem mankind is cooperation." ~Bertrand Russell

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 insureds[5] 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.

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[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); *Saft 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).

The Fifth Amendment Privilege Against Self-Incrimination Versus An Insured's Duty To Cooperate With An Insurer

By: Eric W. Santos

How many times over the years have we heard the stock phrase, "I plead the Fifth" or "I take the Fifth" uttered during crime sagas? Although nowadays probably not as often quoted as the statement "You can't handle the truth!!!", a main reason that the refrain "I plead the Fifth" or "I take the Fifth" is so familiar to us is a result of its melodramatic use on television and in Hollywood films.

The Fifth Amendment

As we all know, the phrase "I plead/take the Fifth" actually refers to the privilege against self-incrimination contained within the Fifth Amendment to the United States Constitution. Specifically, it refers to the provision that no person "shall be compelled in any criminal case to be a witness against himself." "However, the privilege against self-incrimination also applies in the civil context. A plaintiff in a civil case does not implicitly surrender the right to invoke the privilege merely by the filing of a civil action."[1]

In the real world, it is unlikely that you will hear such stock phrase being proclaimed in any Congressional hearing or criminal investigation in such over-the-top fashion. It would be even rarer to recount or envision a scenario during an insurance claims investigation in which an insured has asserted/would assert the Fifth Amendment privilege against self-incrimination with such theatrical declaration as one might find in a Hollywood movie. Nonetheless, during a claims investigation, the rights and obligations of an insured and those of the insurer can meet head on. An insured confronted with a criminal investigation has the constitutional right to assert his or her Fifth Amendment privilege. An insurer faced with the vital task of conducting a claim investigation has the right to insist upon the cooperation of the insured in what should be a mutual endeavor to obtain relevant information regarding the facts and circumstances surrounding a claim. As a result, an inherent tension can exist between the rights of the parties to an insurance contract.

The Contractual Obligation to Cooperate

A distinct difference between an insurance claim investigation and a criminal investigation is that an insurance policy's obligations are contractual. Commentators have noted that "[i]nsurance policies written in this country contain certain rights, responsibilities, and obligations apportioned between the insurance company and the insured."[2] It is standard for an insurance policy to contain a cooperation clause that requires an insured to cooperate with the insurance company during the investigation, settlement, or defense of a claim or suit.[3] There are critical purposes for doing so. "Insurance companies insert cooperation clauses into their policies to protect the insurer's right to a fair adjudication of a first-party claim disposition or the defense of the insured's liability or loss in the third-party context." Additionally, with respect to third-party claims, policies contain cooperation clauses "to prevent collusion and fraud between the insured and the injured claimant."[5] "Courts have universally found that the insured cannot use the Fifth Amendment, on the one hand, to avoid the contractual obligation to cooperate with the insurance company in its investigation and, on the other hand, compel the insurance company to provide coverage."[6]

Examinations Under Oath ("EUO's")

Typically, the Fifth Amendment privilege against self-incrimination is invoked by the insured in the midst of a claim investigation to avoid an examination under oath ("EUO") altogether, or in fear of answering certain questions which may be self-incriminating.

Still, "[i]t is almost uniformly held throughout the country that an insured's EUO obligation is not circumvented by Fifth Amendment protection. Some jurisdictions hold that the insured's invocation of the Fifth Amendment at their EUO constitutes a breach of the cooperation clause as a matter of law, while other jurisdictions require a showing of prejudice."[7]

The authority for requiring examinations under oath are the contractual obligations in the insurance policy. "As part of an insured's general duty to cooperate with the insurer after a loss or once a third-party makes a claim, insurance companies include the examination under oath provision, either specifically or by implication, in both personal and liability insurance policies. While the language in an individual policy may vary, the intent is the same—to obtain as much information from the insured as possible. The examination under oath, therefore, has become one of the insurance industry's most important tools in determining the accuracy of an insured's claim and, in turn, in combating fraud and collusion."[8]

In the first-party setting, "Duties of cooperation include the duty to submit to an examination under oath, the duty to respond to reasonable requests for information and documents, and the duty of candor which would prohibit the insured from concealing material information from the insurer or from providing false information in support of the insured's claim."[9] An examination under oath and the information obtained therefrom is at the core of the duty to cooperate. The regard the courts have for the duty to cooperate is illustrated by the case *Aetna Casualty & Surety Co. v. State Farm Mut. Auto. Ins. Co.*, 771 F. Supp. 704 (W.D. Pa. 1991), *aff'd*, 961 F.2d 207 (3d Cir. 1992). Mona Dobbins, the State Farm insured, refused to give a statement to State Farm regarding a motor vehicle accident that occurred on August 8, 1987. During the accident, Ms. Dobbins struck and killed a pedestrian with the vehicle she was driving, which had been leased by her employer Brookline Social Club.[10] Ms. Dobbins left the scene of the accident.[11] In light of the criminal proceedings pending against her, Ms. Dobbins refused to give a statement to State Farm on the basis of her Fifth Amendment privilege against self-incrimination.[12] On August 24, 1987, State Farm sent Ms. Dobbins a reservation of rights letter.[13] In December of 1987, a civil action was filed against State Farm's insured [Ms. Dobbins] by the estate of the pedestrian killed.[14] After a default judgment was obtained by the estate against Ms. Dobbins, State Farm sent two letters to Ms. Dobbins in March of 1989 "denying coverage under its liability policy issued to the Brookline Social Club and refusing to defend or indemnify her because of her refusal to cooperate with State Farm's investigation."[15] Following State Farm's denial of coverage, the estate of the pedestrian killed presented an uninsured motorist claim to Aetna, the uninsured motorist insurer.[16] After Aetna paid the claim under its uninsured motorist coverage, it filed an action against State Farm for indemnification from State Farm for the uninsured motorist claim that Aetna paid.[17] The jury returned a verdict in favor of State Farm finding that State Farm insured, Ms. Dobbins, breached her duty to cooperate and that State Farm had suffered substantial prejudice.[18] Aetna filed a motion for judgment notwithstanding the verdict.[19] Upon consideration of Aetna's motion for judgment notwithstanding the verdict, the court upheld State Farm's coverage denial, rejecting Aetna's argument that Ms. Dobbins' Fifth Amendment privilege excused her breach of contract as a matter of law.[20] Indeed, as one commentator indicated, "In these trying times of exaggerated and intentionally false claims, examinations under oath offer the insurance company's best chance of aggressively investigating first party claims in a good faith atmosphere. Examinations under oath should be effectively utilized by the insurance company in its search for truth in the war against arson and false claims."[21]

A common examination under oath provision in a homeowner's insurance policy states:

> **In case of a loss, anyone we protect must:**
> **. . .**
> **at our request, separately submit to examinations and statements under oath and sign a transcript of the same.**

Whereas submitting to an EUO is a contractual duty, conversely, "[t]he Fifth Amendment privilege against self-incrimination applies to a 'proceeding' or an 'action.'"[22] An EUO does not involve state action and is, thus, neither a "proceeding" nor an "action" as those terms are contemplated by the Fifth Amendment.[23]

Importantly, the court in *Aetna Casualty & Surety Co. v. State Farm Mut. Auto. Ins. Co.* emphasized that an insured's Fifth Amendment privilege is "trumped" by the insurance policy's duty to cooperate and reasoned as follows:

> **A person may not be penalized for asserting the Fifth Amendment privilege against self-incrimination, but that does not mean that if a person refuses to make a statement in a civil proceeding that the failure to provide evidence may not have adverse consequences.[24]**

Unlike those jurisdictions that have held that invoking the Fifth Amendment during an EUO is a breach of the cooperation clause as a matter of law, however, the court in *Aetna Casualty & Surety Co. v. State Farm Mut. Auto. Ins. Co.* discussed the additional requirement under Pennsylvania law that insurers demonstrate prejudice by the assertion of the Fifth Amendment privilege.[25] Specifically, the court stated that for an insurer to disclaim coverage on the basis of a breach of a cooperation clause, "the insurer must prove (1) that the putative insured breached its duty to cooperate in the insurer's investigation and defense of a claim, and (2) that the insurer suffered substantial prejudice as a result."[26] On the substantial prejudice issue, State Farm argued "that the evidence concerning the identity of the driver and the comparative negligence of the [pedestrian] were disputed issues and the absence of any statement by the alleged driver of the vehicle which struck [the pedestrian] materially impaired State Farm's ability to defend against any civil claim by the . . . estate."[27] The court concluded that the determination by the jury that State Farm's insured's refusal to make any statement substantially prejudiced State Farm's investigation and defense "while of doubtful correctness . . ." was not irrational or having no basis in the record.[28]

In the context of a first-party property claim:

> **[T]he issue is not whether the insurer has been prejudiced in its defense of the third party claim, but whether the insurer has been able to complete a reasonable investigation with regard to whether the insured's claim is valid. If the insured's refusal to cooperate prevents the insurer from completing such a reasonable investigation, prejudice should be found to exist. Specifically, it has been held that the insurer can deny coverage, following an insured's refusal to provide documents reasonably requested by the insurer, on the basis that the insurer has been prejudiced because the insured's refusal prejudices the insurer by putting the insurer in the untenable position of either denying coverage or paying the claim without the means to investigate its validity. An insurance company does not have to prove that it would have won the case had it obtained the insured's cooperation.[29]**

***Miller v. Augusta Mut. Ins. Co.*, 157 Fed.Appx. 632 (4th Cir. 2005), is an example of a third-party case that included a declaratory judgment claim in which the court found that the insured's invocation of the Fifth Amendment at the EUO itself constituted a breach of the cooperation clause without requiring more. In *Miller*, the estate of a child who was fatally shot by a friend brought a declaratory judgment action requesting a determination that the wrongful death claim was covered by a homeowner's insurance policy issued by Augusta Mutual to the friend's parents.[30] Augusta Mutual investigated whether the wrongful death action was covered under the homeowner's insurance policy. The policy contained a cooperation clause which required the insureds to "secure and give evidence."[31] Despite numerous requests by Augusta Mutual for the insured's son to do so, the insured's son refused to provide a statement under oath as a part of the claim investigation in light of the pending criminal charges.[32] Eventually, the insured's son and his parents did give statements under oath, but the insured's son, "accompanied by his criminal attorney, refused to answer any questions about the shooting, asserting his Fifth Amendment rights as his attorney advised him to do."[33] The district court below found that the insured's son "breached his duty to cooperate by asserting his Fifth Amendment rights and declining to give a statement to Augusta Mutual . . . and that the . . . policy was void as to [the insured's son] and that Augusta Mutual had no duty to defend [the insured's son]."[34] The Fourth Circuit Court of Appeals applied Virginia law, which**

provides that an insurer cannot be liable under a policy when there is a material breach of the duty to cooperate under a cooperation clause, "even if the insurer is not prejudiced . . ." as a result.[35] The court affirmed the district court's decision, recognizing Virginia law's requirement that in order to demonstrate a breach of a cooperation clause, there must be proof of a willful breach of the clause and that the insurer made a reasonable effort to secure the insured's cooperation.[36] In so affirming the lower court, the Fourth Circuit reasoned that Augusta Mutual made repeated efforts to obtain information from the insureds about the shooting to no avail, and that the former's efforts to investigate the claim were reasonable as a matter of law.[37] [38]

Traditionally, the element regarding the willful and intentional violation of the cooperation clause is seen in the context of third-party claims. As the Court stated in *Harary v. Allstate Ins. Co.*:[39]

> **A fire insurance claimant who is suspected of arson has a significant burden of cooperation. Although the plaintiff stresses the 'heavy burden' on an insurer to establish non-cooperation . . . the cases cited by the plaintiff almost uniformly involved third party recovery issues under insurance other than fire insurance, where the cooperation requirement is far less stringent. The basis for this distinction was explained in *Dyno-Bite:***
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> > **A distinction may be drawn, however, between a court's natural reluctance to see an accident victim deprived of his source of payment because a liability carrier claims that its assured has failed to cooperate, and an indemnity carrier denying payment to its insured because the insured has failed to cooperate in discovering a possible arson. The injured accident claimant is an innocent victim of the insured's failure to cooperate. A fire insured, however, controls his own fate . . . .**

Another instructive decision, a case involving a first-party claim made under a homeowner's insurance policy, is that of *Pilgrim v. State Farm Fire & Cas. Co.*,[40] wherein the insureds "produced their W-2 forms for 1990-1993, but refused to produce anything else" without the insurer executing a confidentiality agreement. The Court found the absence of cooperation as a matter of law, stating:

> **The Pilgrims promised to cooperate with State Farm's investigation by producing "records and documents" as often as State Farm "reasonably require[s]". The issue is whether, as a matter of law, they breached their promise. No evidence is disputed. That evidence demonstrates that the Pilgrims at least partially complied with the cooperation duty. For example, during Keith's and Renae's interviews, both answered questions about financial accounts they maintained, to whom and how much money they owed, the status of their taxes, the absence of judgments, liens and outstanding credit card balances. Nevertheless, no reasonable juror could conclude that the Pilgrims substantially cooperated in the production of relevant, reasonable, requested financial documents. With the exception of their W-2s, they produced nothing. And they refused to authorize third parties to disclose relevant financial information to State Farm. Their substantial failure to cooperate constitutes a breach of the cooperation clause as a matter of law.[41]**

The Court, therefore, affirmed the insurer's award of summary judgment.[42] *See also Porcello v. Allstate Ins. Co.;*[43] *Harary v. Allstate Ins. Co.;*[44] *Buongiovanni v. Allstate Ins. Co.;*[45] *Levy v. Chubb Ins.*[46]

Final Thoughts

Fifth Amendment privilege and duty to cooperate issues implicated during a claim investigation will be unique to the facts and circumstances surrounding such claim, whether first-party or third-party. In the criminal setting, we recognize an insured's right to assert the Fifth Amendment privilege. In the insurance world, we recognize that an insurer must diligently fulfill its obligations during the investigation of a claim.

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[1] Steven Plitt and Jordan Ross Plitt, 1 Practical Tools for Handling Insurance Cases § 2:5.

[2] Steven P. Groves, Sr., Statements/Examinations Under Oath, 2 Law and Prac. of Ins. Coverage Litig. § 3.1.

[3] *See, e.g.*, ISO Props., Inc., Commercial General Liability Coverage Form § IV(2)(c) (2006) ("You and any other involved insured must . . . Cooperate with us in the investigation or settlement of the claim or defenses against the 'suit' . . .").

[4] Steven Plitt and Jordan Ross Plitt, 1 Practical Tools for Handling Insurance Cases § 2:5.
(citing *Forest City Grant Liberty Associates v. Genro II, Inc.*, 438 Pa. Super. 553, 652 A.2d 948 (1995) (holding that an insured must provide the insurer with information necessary to prepare a defense, aid in securing witnesses appearance, attend hearings and trials, and otherwise render all reasonable assistance necessary)).

[5] *Id.*

[6] *Id.*
[7] *Id.*; *See, e.g.*, *Aetna Cas. & Sur. Co. v. State Farm Mut. Auto. Ins. Co*., 771 F.Supp. 704 (W.D. Pa. 1991), *aff'd*, 961 F.2d 207 (3d Cir. 1992) (holding that under Pennsylvania law, for breach of a cooperation clause defense to be valid, an insurer must prove that the putative insured breached its duty to cooperate in the insurer's investigation and defense of a claim, and that the insurer suffered substantial prejudice as a result).
[8] Stephen P. Groves, Sr., Insurance policy language requiring an insured to submit to a statement or examination under oath, 1 Law and Prac. of Ins. Coverage Litig. § 3:5.
[9] Miss. Ins. Law and Prac.§ 9:1 (footnote omitted).
[10] *Id.* at 706.
[11] Michael A. Hamilton, *Property Insurance: A Call for Increased Use of Examinations Under Oath for the Detection and Deterrence of Fraudulent Insurance Claims*, 97 Dick. L. Rev. 329 (1993) (footnote omitted).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 707.
[18] *Id.*
[19] *Id.* at 705.
[20] *Id.* at 708.
[21] Michael A. Hamilton, *Property Insurance: A Call for Increased Use of Examinations Under Oath for the Detection and Deterrence of Fraudulent Insurance Claims*, 97 Dick. L. Rev. 329 (1993) (footnote omitted).
[22] Steven Plitt and Jordan Ross Plitt, 1 Practical Tools for Handling Insurance Cases § 2:5.
[23] *Id.; See, e.g., State Farm Indemnity Co. v. Warrington*, 350 N.J. Super. 379, 795 A.2d 324 (App. Div. 2002) ("The majority view is premised upon the understanding that the compulsion secured by the Constitution is 'a compulsion exercised by the State in a sovereign capacity in some manner known to the law …. To bring a case within the constitutional immunity, it must appear that compulsion was sought under public process of some kind'"); *see also Metlife Auto & Home v. Cunningham*, 797 N.E.2d 18, 22 (Mass. App. Ct. 2003) (holding that the insured's "assertion of rights under the Fifth Amendment to the United States Constitution . . . afforded him no sanctuary from his obligation to cooperate [with his insurance company], for it is not by the [Government] or by [MetLife] that [Cunningham] is compelled to . . . furnish evidence against himself, but by his own contractual undertaking").
[24] *Id.* at 707.
[25] *Id.*
[26] *Id.* (emphasis supplied).
[27] *Id.*
[28] *Id.* at 709. *See, e.g., Forest City Grant Liberty Associates v. Genro II, Inc.*, 438 Pa.Super. 553, 652 A.2d 948, 951 (1995) (involving a third-party claim in which the court analyzed the duty to cooperate and stated that "[a]lthough a breach of a duty to cooperate will relieve the insurer from liability under the policy, the failure to cooperate must be substantial and will only serve as a defense where the insurer has suffered prejudice because of the breach." "Whether there has been a material breach of an insured's duty to cooperate is a question for the finder of fact.") (internal citations omitted).
[29] 1 Insurance Claims & Disputes § 3:2 (footnotes omitted).
[30] *Id.* at 633.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 638 (emphasis supplied).
[36] *Id.* at 639.
[37] *Id.*
[38] In addition to material breach and prejudice, some courts have found that in order "[t]o deny liability coverage because of a violation of the policy's cooperation clause, an insurance company must prove . . . the exercise of reasonable diligence to secure the insured's cooperation," Steven Plitt and Jordan Ross Plitt, 1 Practical Tools for Handling Insurance Cases § 2:5.
[39] 988 F.Supp. 93, 102-103 (E.D.N.Y. 1997) (citations omitted).
[40] 89 Wash. App. 712, 950 P.2d 479, 481 (1997).
[41] *Id.* at 723 (footnote omitted).
[42] *Id.* at 725 ("Without access to financial documents, State Farm could not evaluate the validity of the Pilgrims' claim. It could not decide whether the claim was covered, much less prepare a defense to the inevitable suit by the Pilgrims if it denied coverage. It could not satisfy its statutory duty to ferret out fraud. The Pilgrims' refusal to disclose relevant financial information prejudiced State Farm as a matter of law.").
[43] 4 Fed.Appx. 531 (9th Cir. 2001) (Production of many documents, but not all requested, and failure to execute authorization for insurer to obtain necessary information, justified summary judgment to insurer).
[44] 988 F.Supp. 93 (E.D.N.Y. 1997) ("No reasonable jury could find that a failure to provide any of this information [income information] was not material at this point in time.").
[45] 240 A.D.2d 455, 658 N.Y.S.2d 431 (1997) ("[P]laintiffs' continued failure, without explanation or excuse, to provide the defendant with their tax returns and credit history, or authorizations for those documents, constituted a material breach of their insurance policy precluding their recovery") (citations omitted).
[46] 240 A.D.2d 36, 659 N.Y.S.2d 266 (1997) ("The delay and avoidance here has precluded any possibility of obtaining anything but stale information.").

Risks in Denying Coverage Based Upon Failure to Cooperate: A High Bar in West Virginia

By: Lucien G. Lewin and Katherine M. Moore

Risky business! Denial of coverage by an insurance carrier for failure to cooperate may result in extracontractual suits and claims for damages.[1] In West Virginia, when a policyholder substantially prevails and coverage is found to exist after a previous denial by the carrier, damages may be awarded. These damages may include attorney fees and consequential damages, such as economic loss and aggravation. Moreover, if the policyholder can prove actual malice[2] on the part of the insurer, then punitive damages, pursuant to *Hayseeds, Inc. v. State Farm Fire & Casualty*,[3] may also be awarded.[4] Additionally, damages may be awarded for violations of section 33-11-4(9) of the West Virginia Unfair Trade Practices Act ("UTPA").[5]

Of course, an insurer may be relieved from its duty to defend and indemnify where the insured fails to provide reasonable assistance during the litigation process. An insured's failure to cooperate, in the first or third-party context, is a material breach of the contract,[6] which the insurer may raise as an affirmative defense regarding coverage.[7] However, to successfully assert this defense in West Virginia third-party cases, the insurer must demonstrate that the insured's failure to cooperate was substantial and caused it to suffer actual prejudice in its defense of the claim.[8] The possibility of future harm is insufficient; the insurer must "prove that it has *been harmed* by the insured's uncooperative conduct."[9] In addition, before the insurer can deny coverage based upon an insured's failure to cooperate, it "must show that its insured willfully and intentionally violated the cooperation clause."[10] In sum, when the insurer seeks to avoid liability under the policy based upon failure to cooperate, the burden is "a heavy one." [11]

Importantly, because "an insured's duty to cooperate is triggered only when the insurer demands such cooperation," the insurer must request information or assistance before it may reasonably assert a breach of the policy's cooperation provision.[12] In seeking cooperation from its insured, the insurer has a duty to exercise "reasonable diligence."[13] Notably, some jurisdictions require only "substantial compliance" by the insured; it is not required that the insured fully cooperate.[14] Outright refusal, upon the insurer's request, to submit to examination or produce documents are clear cases of an insured's failure to cooperate.[15] But other cases are not so clear. For example, in *Stover v. Aetna Casualty & Surety Co.*, the insured brought suit against his insurer to recover policy proceeds. The insured acquiesced in and appeared for examination, answering the majority of questions posed.[16] Ultimately, however, the court determined that because the insured provided either "no response, or gave vague, general answers" to a specific line of questioning regarding a potentially "key component" of the case, he failed to cooperate as anticipated by the terms of the policy.[17]

Yet an insured's filing of suit on a policy, even during the insurer's investigation and prior to any repudiation of coverage, does not constitute failure to cooperate as a matter of law.[18] Even an insured's disappearance before and nonattendance during trial, depending on the intensity and extent of the inquiry undertaken by the insurer to locate him, may not establish a failure to cooperate.[19] In *Pennsylvania Threshermen & Farmer's Mutual Casualty Insurance Co. v. Owens*, even though the insurer contacted the insured's mother, wife, and pastor, the court found the efforts insufficient.[20] The court acknowledged that "[n]o inquiry was made from the police or at [the insured's] place of employment where his employer or fellow workers might possibly have given a clue to his whereabouts, or at the Post Office to learn if he had left a forwarding address."[21] The court concluded that "[r]equiring such additional efforts would not seem to impose an unreasonable burden" on the insurer.[22]

Due to the hurdles in establishing a failure to cooperate, denial of coverage based upon the same may result in extracontractual suits and claims for damages. For example, in *Felman Production, Inc. v. Industrial Risk Insurers*, the insured brought claims against its insurer for bad faith and violations of the West Virginia UTPA based upon the insurer's failure to pay under two separate policy provisions.[23] In elaborating upon the availability of extracontractual claims to insureds, the United States District Court for the Southern District of West Virginia explained:

> [A]n insured who substantially prevails on a coverage claim may seek additional damages for aggravation, inconvenience, net economic loss, and attorney fees under *Hayseeds* . . . . The insured does not need to prove bad faith on the part of the insurer to recover *Hayseeds* damages, but may do so in order to seek punitive damages. . . . [An insured may also raise claims] based on violations of the unfair claim settlement provisions of the West Virginia Unfair Trade Practice Act (WVUTPA). This so-called "*Jenkins*" cause of action does not depend upon a successful contractual claim for coverage. Instead, a *Jenkins* plaintiff must show that the insurer violated one or more of the unfair claims settlement provisions and that such violations entail a general business practice on the insurer's part. Damages may include increased cost and expenses, including attorney fees, as well as punitive damages. Proof of violations may come from "multiple violations . . . occurring in the same claim."[24]

In conclusion, insurers should be cognizant of the potential hazards in claiming the lack of coverage based upon an insured's failure to cooperate in order to avoid bad faith liability and attendant damages. While an insured's lack of cooperation may be raised by the insurer as an affirmative defense regarding policy coverage, denial of coverage could lead to extracontractual suits. Insurance professionals and their counsel should be aware of the legal standards and requirements applicable to denying insurance coverage based upon the failure to cooperate, which, as described above, can be "risky business" in jurisdictions with standards akin to those in West Virginia.

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[1] *See, e.g., Jones v. Am. Family Mut. Ins.*, Civil Action No. 15-cv-00631-WYD-MEH, 2017 WL 4350362, *5 (D. Colo. Feb. 22, 2017); *Summit Bank & Tr. v. Am. Modern Home Ins. Co.*, 71 F. Supp. 3d 1168, 1175–76 (D. Colo. 2014); *Felman Prod., Inc. v. Indus. Risk Insurers*, Civil Action No. 3:09-0481, 2011 WL 4543966 (S.D. W. Va. Sept. 29, 2011); *Nupro Indus. Corp. v. Lexington Ins. Co.*, Civil Action No. 08-4809, 2009 WL 10687684, *1–2 (E.D. Pa. Oct. 14, 2009); *Rounick v. Fireman's Fund Ins. Co.,* No. CIV. A. 95-CV-7086, 1996 WL 605128, *1 (E.D. Pa. Oct. 18, 1996); *see generally* 14 Steven Plitt Et Al., Couch On Insurance. § 205:1 (3d ed. 2017) ("Where the breach [of failing to defend] is deemed unreasonable, in some jurisdictions, it is also deemed to violate the covenant of good faith and fair dealing, for which tort remedies for 'bad faith' may be rendered.").

[2] Malice in this instance means "that the [insurance] company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim." *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 330–31, 352 S.E.2d 73, 80–81 (1986).

[3] 177 W. Va. 323, 352 S.E.2d 73 (1986).

[4] An insurer may "be held liable for punitive damages by its refusal to pay on an insured's property damage claim . . . [if] such refusal is accompanied by a malicious intention to injure or defraud." *Id.* at Syl. Pt. 2.

[5] For example, damages may be awarded when an insurer refuses "to pay claims without conducting a reasonable investigation based upon all available information," fails "to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed," does not "attempt [ ] in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," or attempts "to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application." W. Va. Code § 33-11-4(9)(d), (e), (f), (h). Importantly, to assert a claim under § 33-11-4(9), the insured must demonstrate that the carrier committed or performed one or more of listed violations "with such frequency as to indicate a general business practice." W. Va. Code § 33-11-4(9). "More than a single isolated violation of W. Va. Code, 33-11-4(9), must be shown in order to meet the statutory requirement of an indication of a 'general business practice.'" Syl. Pt. 2, *Jenkins v. J. C. Penny Cas. Ins. Co.*, 167 W. Va. 597, 280 S.E.2d 252 (1981), *overruled on other grounds by State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994).

[6] *See Stover v. Aetna Cas. & Sur. Co.*, 658 F. Supp. 156, 159 (S.D. W. Va. 1987) ("[T]he failure of an insured to cooperate with the insurer has been held to be a material breach of the contract and a defense to a suit on the policy.").

[7] 17A Couch On Insurance § 254:100.

[8] Syl. Pt. 1, *Bowyer by Bowyer v. Thomas,* 188 W. Va. 297, 423 S.E.2d 906 (1992).

[9] *Soyoola v. Oceanus Ins. Co.*, Civil Action No. 2:13-cv-08907, 2014 WL 4215515, at *8 (S.D. W. Va. Aug. 25, 2014) (emphasis in original) (internal quotation and citation omitted).

[10] Syl. Pt. 2, *Bower*, 188 W. Va. 297, 423 S.E.2d 906.

[11] 17A Couch On Insurance § 254:100.

[12] 14 Couch On Insurance § 199:20.

[13] Syl. Pt. 7, *Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W. Va. 293, 452 S.E.2d 384 (1994); *see* 14 Couch On Insurance § 199:21.

[14] 14 Couch On Insurance § 199:16.

[15] *See Stover*, 658 F. Supp. at 159–60; *see also Felman*, 2011 WL 4543966, at *4.

[16] *Stover*, 658 F. Supp. at 160.

[17] *Id.*

[18] *See Felman*, 2011 WL 4543966, at *5 ("[A] plaintiff's failure to cooperate may void a policy by its contractual terms, but there is no basis for the argument that filing suit is a failure to cooperate as a matter of law.").

[19] *See Pa. Threshermen & Farmer's Mut. Cas. Ins. Co. v. Owens*, 238 F.2d 549, 551–52 (4th Cir. 1956).

[20] *See id.* at 551.

[21] *Id.*

[22] *Id.*

[23] *Felman*, 2011 WL 4543966, at *6.

[24] *Id.* (internal citations omitted).

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