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INTRODUCTION

In M.F.A. Mutual Insurance Co. v. Cheek,1 the Illinois Supreme Court held that an insurer must be prejudiced by its insured's failure to cooperate before it could be excused from performance under a liability insurance policy. Prior to Cheek an insurer was not required to establish that its policyholder’s lack of cooperation had actually prejudiced its defense of a claim under the policy.2 A material and substantial breach of the duty to cooperate by the insured was sufficient to release the insurer from its obligations under the insurance contract.3 Thus the Cheek decision imposes a heavier burden on the insurer seeking an excuse from liability under the insurance contract. This Comment will discuss the rationale and purpose of the cooperation clause and will examine the impact of the Cheek decision on insurance law in Illinois.

THE COOPERATION CLAUSE

The standard automobile liability insurance policy, is a bi-lateral contract in which the insurer promises to pay all damages which the insured becomes legally obligated to pay as a result of the operation or ownership of the insured vehicle and to defend all claims brought within the policy.4 The insurer’s undertaking is qualified by several

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3. See authorities cites in note 2 supra.
4. A typical insurance policy provides as follows:
   X insurance company. . .agrees with the insured. . .in consideration of the payment of the premiums and in reliance upon the statements in the declarations and subject to all of the terms of this policy: to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: (a) bodily injury, sickness or disease, including death resulting therefrom, hereinafter called “bodily injury,” sustained by any person; (b) injury to or destruction of property, including loss of use thereof, hereinafter called “property damage”; arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

INSUR. L. REP. (CCH) Auto. Cas. 2d 2051-57.

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Typically, this clause requires the insured to disclose all the facts surrounding the accident and to assist in the settlement or trial of any suits brought under the policy. The purpose of this clause is: (1) to prevent collusion between the insured and an injured claimant; (2) to enable the insurer to fully investigate the facts of a claim; and (3) to facilitate the insurer's conduct of any trial.

Frequently accidents occur in which the injured victim is a friend or relative of the insured. Not surprisingly, the insured might wish to ally himself with the plaintiff to their mutual benefit. In other cases, the insured's presence at the trial may be critical. If the insured is the principal or only witness for the defense, his absence from the proceedings may precipitate a judgment for the plaintiff. Thus, the cooperation clause gives the insurer confidence that he will be able to conduct a proper defense.

Breach of the conditions of a liability insurance policy releases the insurer from its obligations under the policy and terminates the contract of insurance. In Coleman v. New Amsterdam Casualty Co., an insured refused to render information to the insurer concerning a claim. Judge (later Justice) Cardozo, analyzing the legal effect of this breach of the policy's standard cooperation clause, stated:

Cooperation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the

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5. A typical cooperation clause is as follows:

Assistance and Cooperation of the Insured—The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury, property damage or loss with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.


8. This result reflects the general law of contracts which holds that breach of a condition does not give rise to an action for damages. J. Murray, Murray On Contracts, §§134-35 (2nd rev. ed. 1974) [hereinafter cited as Murray].

Likewise, under an automobile insurance policy, an insured's breach of the condition of cooperation relieves the insurer from his duty to pay all claims resulting from the operation or ownership of the insured vehicle.

Most jurisdictions treat the cooperation clause as a condition subsequent; consequently the insurer must plead and prove the breach. Illinois is in accord with the majority. In some instances, the insurer may be precluded from asserting a breach of the cooperation clause through the doctrines of estoppel or waiver.

If the insurer fails to promptly notify the insured that it intends to disclaim its liability under the policy, either doctrine may deprive the insurer of its defense. The policy justification for application of these doctrines is that the insured relies on the insurer's conduct of his defense. The terms of the standard policy require the insured to permit the insurer complete control of the defense of all claims brought under the policy. The requirement that the insured relinquish control of his own defense is theoretically sound only so long as the

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10. Id. at 276-77, 10 N.E. at 369. A condition is subsequent if the occurrence extinguishes a duty which had been previously active. A condition is precedent if the fact or event which constitutes the condition must occur in order that the duty of the promisor be made active. Murray, supra note 8, at §139. The distinction is not of substantive importance, for breach of either type of condition will excuse the insurer from performance. The difference is important, however, for matters of procedure. Occurrence of a condition precedent must be pled and proved by the party seeking to establish liability under the contract, whereas breach of a condition subsequent must be pleaded as an affirmative defense by the party seeking to disclaim liability (the insurer). See Glens Falls Indem. Co. v. Keliher, 88 N.H. 253, 187 A. 473 (1936).


14. Waiver has been defined as a voluntary relinquishment of a known right. An estoppel is found when one's acts induce justifiable reliance by another. Comment, Insurer's Duty to Defend, 68 Harv. L. Rev. 1436, 1443 (1955) [hereinafter cited as Duty to Defend]; Comment, The Insurer's Duty to Defend Under a Liability Insurance Policy, 114 U. Of Penn. L. Rev. 734, 736 (1966). Although the concepts are analytically distinguishable, in practice they are not. 14 Couch, supra note 12, at §51:116; Murray, supra note 8, at §189-193.


16. See note 4 supra.
interests of the insured and insurer are identical or nearly so. Consequently, the courts will not permit an insurer to continue to direct the insured's defense while it secretly plans to disclaim liability. Indeed, it would be unethical for the insurer's counsel to purport to represent the insured when he is aware that the insurer intends to invoke policy defenses and leave the insured solely liable for the judgment. The Illinois Supreme Court explained these considerations as follows:

When an insurer wishes to assert its nonliability under the policy, it must notify the insured without delay. The reason is that the claim might be of such a character as that the amount of damages recovered in a lawsuit by the insured party would exceed the indemnity and subject the insured to considerable loss and damage, and therefore the insured should have a right to know with reasonable promptness the attitude of the indemnity company, so that he might be in a position to take such action as would not only protect the indemnity company, but save himself from loss and damages.

The only exception to the insurer's duty to give prompt notice arises when the insured cannot be located. To require notice under these circumstances would unjustly deprive the insurer of its legal rights. Thus, the insurer may proceed with the defense of the lawsuit without jeopardizing its right to assert the policy defense.

The insurer may use either a non-waiver agreement or a reservation of rights to preserve its legal rights. The former is a bi-lateral contract in which the insurer agrees to defend the action and the insured agrees not to claim waiver or estoppel if the insurer later chooses to invoke policy defenses. A reservation of rights is simply a notice to the insured that the insurer does not admit liability under the policy and will assert its policy defenses at a later time. Under this method, the insured need not manifest his assent; it will

22. Duty to Defend, supra note 14, at 1446; 16A APPLEMAN, supra note 6, at §9377.
be inferred from acquiescence. However, if the notice is equivocal or ambiguous it will be held ineffective. In *Popovich v. Gonzales*, a telegram to the insured which stated "failure to respond . . . may be considered [a breach] and your insurance carrier can refuse to satisfy the judgment," was held insufficient notice to prevent a claim of waiver or estoppel by the insured.

If the insured refuses to accede to the insurer's reservation of rights, the insurer is left with two alternative methods by which to preserve its defenses. First, the insurer may seek declaratory relief. Once an insured party has filed suit the insurer may get a judicial declaration that it has been relieved of liability by reason of its insured's breach of the cooperation clause. However, prior to that time there is no actual "case or controversy." Thus, declaratory relief is not a solution where the insurer merely wants to investigate the facts of an accident before the suit is filed. The insurer's other option is simply to withdraw from the litigation. This course of action is not advisable. If the insured loses the suit, collateral estoppel might preclude the insurer from relitigating the facts of the claim in a subsequent proceeding.

Thus it can be seen that to establish a policy defense, an insurer bears a heavy burden of proof. The twin doctrines of waiver and estoppel are often used to prevent insurers from evading their contractual obligations. As one court aptly observed, "In no field of law is legal duty more rigidly enforced."

**Duty and Breach Under The Cooperation Clause Prior to Cheek**

Prior to the decision in *Cheek*, any material and substantial breach of the cooperation clause by the insured would excuse the insurer from performance. Trivial instances of non-cooperation were never enough to work a forfeiture, nor were misstatements or

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27. *Id.*
28. *Id.* at 228, 280 N.E.2d at 758.
30. Illinois courts have jurisdiction to issue declaratory judgments where there is an actual case or controversy. ILL. REV. STAT. ch. 110, §57.1 (1975).
32. Collateral estoppel provides that once a party or its privy has litigated a factual issue, the party may not relitigate that same question if the original decision was adverse. See Apex Mutual Ins. Co. v. Christner, 99 Ill. App. 2d 153, 161-63, 240 N.E.2d 742, 747 (1st Dist. 1968); Comment, *Estoppel of Coverage Defenses*, 69 COLUM. L. REV. 1459 (1969).
34. See generally cases cited note 2 supra.
35. In Norwich Union Indemnity Co. v. Haas, 179 F.2d 827 (7th Cir. 1950), the sole alleged
falsehoods a breach, if seasonably corrected.\textsuperscript{36} However, there was no requirement that the alleged breach lead directly to judgment for the plaintiff.\textsuperscript{37} Thus, the plaintiff could not argue that the breach was harmless because the insurer would have been liable anyway. Sometimes the effects of a finding of a material and substantial breach will be harsh. Stripped of his insurance protection a tortfeasor might be financially unable to satisfy a judgment against him, leaving the injured plaintiff without compensation. To mitigate the possibility that a plaintiff might be indirectly deprived of his only source of recovery, the courts developed a doctrine of excuse and a theory of reciprocal duties under the cooperation clause.

When the alleged breach is the failure of the insured to appear at trial, courts have implied an affirmative duty on the part of the insurer to use good faith and reasonable diligence to secure the insured's attendance.\textsuperscript{38} The courts apply the following rationale: the cooperation clause imposes duties upon the insured but does not specify when or under what conditions the insured is to do particular acts. Therefore, an obligation arises in the insurer to give the insured notice concerning what must be done to fulfill the condition.\textsuperscript{39} When the clause is interpreted in this way, passive non-cooperation is not a breach. For a breach there must be a refusal to cooperate.\textsuperscript{40}

Several cases exemplify the judicial approach to this problem. In \textit{Durbin ex rel. Ferdman v. Lord} the insurer made no effort to keep track of its insured's address changes for more than a year after his deposition had been taken. The court held that under these circumstances the insured's absence from the trial was excused. \textit{Mazzuca breach of cooperation} was a misstatement concerning the location of the social event which the insured had attended immediately prior to the accident. The court found no breach because the falsehood was not material. \textit{See also} \text{Comment, The Cooperation Clause in Automobile Liability Insurance Policies, 51 Mark. L. Rev. 434 (1968).}

\begin{itemize}
  \item \textsuperscript{36} Rowoldt v. Cook County Farmers Mut. Ins. Co., 305 Ill. App. 93, 100, 26 N.E.2d 903, 906 (1st Dist. 1940).
\end{itemize}
involved an insurance policy covering a fleet of rental vehicles. Although the policy contained the standard cooperation clause, the rental agreement made no mention of the duty of the lessee to cooperate with the insurer. The court held that the insurer had not reasonably informed the lessee of his duty to cooperate, and consequently his non-appearance at the trial did not constitute a breach. In Lawlor v. Merit Ins. Co., absence at the trial was excused when the insured requested advance notice of the time of trial in order to arrange his work schedule, but the insurer gave only one day’s notice. An insurer must also exercise reasonable diligence in pursuing all plausible leads in attempting to locate the insured. For example, in Penn v. Progressive General Insurance Co., the court held against the insurer because it had not attempted to contact the insured through the loss payee on the policy. However, where the insured is aware of his duties under the policy and is informed when and where his presence is required, Illinois courts hold that willful failure to attend a trial is a material and substantial breach which relieves the insurer of all liability under the policy.

False or conflicting statements made by the insured prior to or at trial are another frequently asserted breach of the cooperation clause. The insured must give a full, frank, and complete disclosure of the facts surrounding the accident, including the cause, condition, circumstances, and the conduct of the parties at the time. As noted by the United States Court of Appeals for the Ninth Circuit in Home Indemnity Co. of N.Y. v. Standard Acc. Insurance Co.: The insured must tell his insurer the complete truth concerning the accident and must stick to this truthful version throughout the proceedings. He must not embarrass or cripple his insurer in its defense against a civil suit arising out of the accident by switching from one version to another. He must not blow hot and cold to suit his personal convenience.

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43. 27 Ill. App. 3d 150, 326 N.E.2d 529 (1st Dist. 1975).
44. 74 Ill. App. 2d 32, 219 N.E.2d 857 (1st Dist. 1960).
45. A loss payee is the party named in the policy to whom proceeds will be paid upon casualty loss. Typically, a creditor who has a security interest in an automobile will insist that the proceeds of collision insurance be payable directly to himself as loss payee.
48. 167 F.2d 919 (9th Cir. 1948).
49. Id. at 924.
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Mistaken statements made in good faith by the insured are not sufficient to breach the cooperation clause even where the statements destroy the insured’s credibility in the minds of the jurors.\footnote{Gass v. Carducci, 52 Ill. App. 2d 394, 203 N.E.2d 289 (1st Dist. 1964).} Moreover, even if made with intent to deceive, a false statement may be excused if seasonably corrected.\footnote{State Farm v. First Nat. Bank and Trust Co., 2 Ill. App. 3d 768, 277 N.E.2d 536 (3d Dist. 1972); Prudence Mutual Cas. Co. v. Dunn, 30 Ill. App. 2d 469, 175 N.E.2d 286 (1st Dist. 1961); Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1st Dist. 1958); Rowoldt v. Cook County Farmers Mutual Ins. Co., 305 Ill. App. 93, 26 N.E.2d 903 (1st Dist. 1940).} But when disclosure of the truth is delayed until the eve of trial, the insurer will be excused from performance.\footnote{Kirk v. Home Indemnity Co., 431 F.2d 554 (7th Cir. 1970).}

A related breach of the cooperation clause concerns refusals to sign pleadings. However, a good faith refusal to sign court papers will not void the policy,\footnote{Standard Mutual Ins. Co. v. Kinsolving, 26 Ill. App. 2d 1, 199 N.E.2d 442 (2d Dist. 1964).} since the insured is not obliged to combine with the insurer to present a sham defense. An insurer may not require its insured to swear falsely or contrary to the facts as the insured knows them.

Courts view collusion between the insured and the injured plaintiff as a breach,\footnote{Latronica v. Royal Indemnity Co., 8 Ill. App. 2d 337, 342, 132 N.E.2d 16, 19 (1st Dist. 1956); 8 Applemen, supra note 6, at § 4779; 14 Couch, supra note 12, at § 51:109.} but will not construe a breach where the insured merely gives the plaintiff a full and complete statement of the facts of the accident. To be relieved of liability, the insurer must prove dishonesty or bad faith. For example, in Gass v. Carducci,\footnote{52 Ill. App. 2d 394, 203 N.E.2d 289 (1st Dist. 1964).} the insured clearly sympathized with the plaintiff, her mother. She demanded that the insurer pay the policy limits on the claim. Nonetheless, the court refused to find a breach of the cooperation clause by the insured, because she attended trial when requested and, in the court’s view, gave truthful testimony to the best of her ability. Similarly, in Jordan v. Standard Mutual Insurance Co.,\footnote{50 Ill. App. 2d 1, 199 N.E.2d 442 (2d Dist. 1964).} a minor sued his father’s estate after being injured in an automobile accident in which his father had died. Although the mother, as administrator of the insured’s father’s estate, openly aided the plaintiff by hiring his attorneys and instigating his suit, the court held there was no breach of the cooperation clause. The mother had attended court when requested and had complied with every request made of her by the insurer. It is a plausible inference that had her assistance to...
the plaintiff taken the form of false and manufactured testimony, the insurer would have been relieved of liability.

When the insured and the plaintiff collude in bad faith with intent to deceive the insurer, courts have found a willful breach of the duty to cooperate. In Metropolitan Casualty Insurance Co. v. Richardson, the insured admitted that he had given his insurer a false statement regarding the circumstances under which his father-in-law had been injured. In addition, the insured submitted himself to the jurisdiction of a court of a sister state where the law presumably favored the plaintiff. The court held that the insured had conspired in bad faith to deceive the insurer. Consequently, the court held the insurer not liable under the policy.

CHEEK: FACTS AND RATIONALE

The Cheek decision will have a significant impact on insurance law in Illinois, as it requires the insurer to prove prejudice as a result of non-cooperation by the insured. M.F.A. Mutual Insurance Co. issued a policy of liability insurance to George Cheek protecting him from liability up to $10,000 per accident victim. The policy contained both an omnibus clause and a standard cooperation clause. On November 12, 1971, Cheek was riding in his car with William Valleroy and two other persons when the car struck and injured Harold Miller, a pedestrian. Cheek told the police that he had been driving at the time of the accident. He submitted an identical report to an adjuster for M.F.A., his insurer. These statements were corroborated by the other occupants of the vehicle. Eight months later, Miller filed a complaint against Cheek for his injuries, alleging negligence. The prayer for relief sought $75,000—an amount far in excess of Cheek’s policy limits. Cheek immediately went to an M.F.A. office and informed his insurer that it was Valleroy who was driving at the time of the accident.

M.F.A. advised Cheek by letter that it was no longer liable on the

57. 81 F. Supp. 310 (S.D. Ill. 1948).
58. An omnibus clause extends coverage to anyone driving with the permission of the named insured. See Maryland Casualty Co. v. Iowa National Mut. Insurance Co., 54 Ill. 2d 333, 297 N.E.2d 163 (1973).
59. The clause in Cheek’s policy read as follows:
Assistance and Cooperation of the Insured—The insured shall cooperate with the Company, disclosing all pertinent facts known or available to him, and upon the Company’s request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization that may be liable to the insured with respect to which insurance is afforded under the policy.
policy by reason of Cheek's breach of the cooperation clause. M.F.A. defended the negligence suit under a reservation of rights, and simultaneously filed a complaint against Cheek, Miller, and Valleroy seeking a declaration of their rights under the policy. After a trial, the court found for the defendants. M.F.A. appealed, asserting that Cheek's breach of the cooperation clause released it from its obligations under the insurance contract.

The Fifth District considered the arguments in favor of the material and substantial breach test and the prejudice standard, and concluded that the latter was the better approach. The court observed:

The use of substantial and material breach standard is ordinarily based on the argument that a liability insurance policy is a private contract between an insured and an insurer, and that the contractual expectations of the parties should be protected by a strict enforcement of the requirement of cooperation as a condition precedent to the insurer's duty to pay.

Nevertheless, the court recognized a number of countervailing factors which suggested adoption of the prejudice standard. Initially, the court recognized the fact that insurance contract terms are not the product of bargaining but rather are dictated by the insurer. The court further observed that liability insurance is no longer "entirely a private matter between an insured and his insurer, and that an accident victim has an interest in the proceeds of liability insurance which cannot be easily disregarded." The court viewed the injured claimant as a third party beneficiary entitled to protection as a matter of public policy. Moreover, the material and substantial test permitted the insurer to seize upon any instance of non-cooperation and thereby materially improve its position. In effect the insurer had a greater interest in the insured's breach of the condition than in the insured's cooperation. Finally, the court noted

60. Apparently no issue of waiver was raised in the case.
61. For a discussion of reservation of rights and non-waiver agreements see the text accompanying notes 22 to 26 supra.
62. Neither Cheek nor Valleroy appeared in the declaratory judgment action. Notwithstanding this, the trial court entered judgment in their favor and dismissed M.F.A.'s complaint. In effect, the trial court had held that the cooperation clause had not been breached and that the policy was not void. On appeal, the Fifth District Appellate Court affirmed the trial court's ruling on the substantive law, but held that the trial court had committed a procedural error by dismissing the complaint. The trial court should have entered an order declaring the rights of the parties. 34 Ill. App. 3d at 220, 340 N.E.2d at 333.
63. Id. at 209, 215, 340 N.E.2d 331, 335-36 (5th Dist. 1975).
64. Id. at 216, 340 N.E.2d at 336.
65. Id.
66. Id. at 216-17, 340 N.E.2d at 336.
that the prejudice standard had been accepted by a growing majority of American jurisdictions. In view of these arguments, the court rejected the material and substantial test in favor of the prejudice standard.

The supreme court affirmed, stressing the public policy rationale. As did the appellate court, the supreme court began its analysis by recognizing the "modern view" that a liability insurance policy is more than a private agreement between the insurer and the insured. The court quoted extensively from an opinion from the Washington Supreme Court:

Such an approach [the material and substantial breach standard] places an undue emphasis on traditional, technical contract principles and their dubious application in cases of this nature. In addition, insurance policies, in fact, are simply unlike traditional contracts, i.e., they are not purely private affairs but abound with public policy considerations, one of which is that the risk-spreading theory of such policies should operate to afford to affected members of the public—frequently innocent third persons—the maximum protection possible consonant with fairness to the insurer. [Citation.] It is manifest that this public policy consideration would be diminished, discounted, or denied if the insurer were relieved of its responsibilities although it is not prejudiced by the insured's actions or conduct in regard to its investigation or presentation and defense of the tort case. Such relief, absent a showing of prejudice, would be tantamount to a questionable windfall for the insurer at the expense of the public.

The court concluded that adherence to the lesser standard for determining the effect of a breach would be against the public interest. The court found persuasive authority to support its public policy rationale in the existence of public interest legislation regulating the insurance industry. The court cited statutes requiring the inclusion of certain terms in insurance policies, and alluded to the Financial Responsibility Act and the statutes requiring Uninsured Motorist Coverage. If all Illinois drivers were required to have liability insurance, an inference could be drawn in favor of a strong public policy in support of the prejudice test as adopted by the court. A compulsory insurance statute would indicate legislative intent that insurer

67. Id. at 217, 340 N.E.2d at 337.
69. Id. at 501, 363 N.E.2d at 813.
70. ILL. REV. STAT. ch. 73, § 7655 (2), 755.11, 755.19, 1000 (1975).
71. Id. at ch. 95 1/2, § 7-301 et. seq.
72. Id. at ch. 73, §755a.
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ance be available to all injured claimants, and would imply a con-
comitant legislative determination that the willful acts of an in-
sured could not deprive the plaintiff of a statutorily created right. However, Illinois does not have a statute requiring mandatory auto-
mobile insurance. Insurance in Illinois is only compulsory for a lim-
ited class of automobile operators. This fact implies that the scope of the public’s interest in automobile insurance is narrower than the court suggests.

The court also relied on a series of decisions holding that an injured claimant is a necessary party when a declaration voiding a policy is sought. For example, in Sobina v. Busby, the plaintiffs were injured in Cook County by an automobile driven by an Ala-
abama resident. After suit was brought in Illinois, the defendant’s insurance carrier brought an action in Alabama seeking a declara-
tion that the policy was void due to material misrepresentations in the application for insurance. Following a trial on the merits, the Alabama court entered an order declaring the policy void. The insurer sought to use this Alabama judgment as a defense in a garnish-
ment proceeding subsequent to trial of the negligence action in the Illinois court. The insurer argued that the Illinois court was bound to give the Alabama judgment full faith and credit. The First Dis-
trict Appellate Court rejected the insurer’s argument and held that the Alabama court’s judgment could not have determined the status of the insurance policy unless the injured claimant was given notice and an opportunity to be heard. Because of public policy, the court in effect found that plaintiffs in a personal injury action have an interest in liability insurance distinct from that of the insured.

Although Sobina and its progeny are an important part of the public policy justification in Cheek, the court did not address the fact that the Sobina case was factually distinguishable. It is difficult to see why notice and the mere fact that an injured claimant is a necessary party in a declaratory judgment action should affect the

73. Only “persons whose drivers license and driving privileges have been revoked . . . or who have failed to pay judgments . . .” are required to prove financial responsibility through posting a bond or carrying insurance. Ill. Rev. Stat. ch. 95 1/2, § 7-301 (1975). However, there was no showing in Cheek that the policy had been issued to satisfy the requirements of the Act nor that Cheek himself was subject to its terms.


75. 62 Ill. App. 2d 1, 210 N.E.2d 769 (1st Dist. 1965).

76. If the insurer wishes to disclaim liability under the policy it answers “no funds” when served with the garnishment citation. See Cuttone v. Peters, 67 Ill. App. 2d 1, 214 N.E.2d 499 (1st Dist. 1966).

77. 62 Ill. App. 2d 1, 210 N.E.2d 769 (1st Dist. 1965).
interpretation of rights and duties of insurer and insured under a contract of insurance. This interpretation does not logically or necessarily follow. At most Sobina could be read to require that an insurer notify the injured party as well as the insured of a reservation of rights. Thus, the authority cited by the court in Cheek offers no more than persuasive support for its conclusion that public policy is best served by a prejudice standard.

DETERMINATION OF PREJUDICE

In his text on Insurance Law, Keeton identifies three separate standards used by courts to determine whether the requisite degree of prejudice is present. Some courts have adopted a strict 'but for' standard which requires the insurer to show that if the insured had cooperated, a contrary result would have been reached by the court or jury. A few states employ a 'probably but for' test whereby the insurer need show only a substantial likelihood that a different outcome would have resulted from the insured's cooperation. Finally, some jurisdictions only require proof that the claim was substantially more dangerous, onerous or otherwise troublesome because of the absence of cooperation.

When the strict 'but for' test is adopted the insurer rarely escapes liability. Illustrative of decisions representing this approach is Camire v. Commercial Insurance Co. in which the insured admitted on cross examination that he had fabricated an exculpatory story. Finding the insurer had not been prejudiced, the court stated:

There has been no demonstration that the insurer defendant could or would have savingly and equitably compromised the tort claim or that the insurer's defense of the insured could have been more effectively and withal creditably conducted had the insured seasonably communicated the objective truth to his insurer. . . . There is no inductive cause in this case to believe that the ultimate and rectified verdict in the tort action was not a commensurate and just financial compensation for this plaintiff's injuries.

In the court's view where liability is clearly proven and the damages

79. The importance of the test chosen for determining prejudice is apparent when one considers that "the effect of the non-compliance [with the cooperation clause] is unknowable in any objective sense. ... Any evaluation by court or jury as to the prejudicial effect of the non-compliance must be entirely conjectural." Duty to Defend, supra note 14, at 1438. For instance, if an insured fails to testify, no one can say with certainty what effect his testimony would have had.
81. Id. at 122, 198 A.2d at 174.
are not excessive, no prejudice results from an insured’s failure to cooperate. An unusual factual situation which resulted in a finding of prejudice to the insurer under the first test is found in *Fidelity and Casualty Co. v. McConnaughy.*

In that case, the insurer rejected a settlement offer in reliance on the false statements of two witnesses procured by the insured. At trial, the truth was disclosed, and a verdict was rendered in excess of the settlement offer. In the subsequent garnishment action, the court ruled that the insurer was liable only to the extent of the settlement offer. The insured alone was liable for the amount of the judgment exceeding that sum.

Relatively few jurisdictions have adopted the ‘probably but for’ test. A typical example is *Billington v. Interinsurance Exchange.* There, the lower court found the failure of the insured to appear at trial to be a breach of the cooperation clause in that if the insured had testified as expected the insurer could have set up a defense based on assumption of the risk. On appeal, the California Supreme Court remanded, holding that, to establish prejudice, it was first necessary to show that the verdict probably would have been different had the additional evidence been heard. Mere inability to present evidence from which the jury might have rendered a different decision would not be sufficient proof that the insurer was prejudiced.

The majority of jurisdictions have adopted the third standard. Under this test it is sufficient to show that absent non-cooperation the insurer’s position would have been substantially easier to defend. For instance, in *Brooks v. Haggard,* the plaintiff claimed that the insurer was not prejudiced by the insured’s failure to appear at trial as the insurer was aware that the insured remembered little of the accident. The court rejected this argument noting that the accident report could have refreshed the insured’s memory. Courts applying the third standard have also found prejudice when the act of non-cooperation affected only the issue of damages. In *Cameron v. Berger,* although the insured could not recall many details of the accident, he was the only witness for the defense. The court held that the insured’s failure to attend the trial was prejudicial as a lesser judgment might have otherwise resulted.

However, where the plaintiff can demonstrate the insurer easily could have protected himself from the prejudice arising from the
insured's non-cooperation, many courts hold that even the third test for prejudice is not satisfied. In *Peerless Insurance Co. v. Sheehan*, the insurer asserted that the insured's failure to attend trial was a breach of the cooperation clause. The court found that no prejudice resulted from the insured's absence, for the insurer could have introduced into evidence testimony from the previous trial of the same cause which had been remanded on an earlier appeal. In *Oberhansky v. Travelers Insurance*, the insurer knew that the insured had recently accepted a new job out-of-state. The court found that the insurer should have anticipated the insured's inability to leave his new job to attend trial and should have taken his deposition to be introduced into evidence. Thus, the court held that the insured's non-attendance at trial was excused. Moreover, the insured's unexcused failure to attend trial will not be deemed prejudicial if the plaintiff can prove that the insured's testimony would have tended to harm rather than help the defense. In *Pupkes v. Sailors*, the insured lied about the facts of the accident and then recanted. He also failed to attend the trial. At the subsequent garnishment hearing where he did testify, the judge viewed his testimony as unimpressive and detrimental to the insured's defense. On appeal, the court relied on the impressions of the trial judge regarding the value of the insured's presence to the defense and found that the insurer had not been prejudiced by the insured's failure to attend trial.

The supreme court in *Cheek* did not set forth any guidelines concerning what the test for prejudice should be in Illinois. The court merely stated that "proof of substantial prejudice requires an insurer to demonstrate that it was actually hampered in its defense by the violation of the cooperation clause." The court cited with approval the opinion of the Ninth Circuit in *Baumler v. State Farm Mutual Auto. Ins. Co.* In *Baumler*, the plaintiff passenger was injured while riding in a car driven by defendant Bailleres, an additional insured under a policy written by defendant State Farm.

86. 194 So. 2d 285 (Fla. App. 1967).
87. 5 Utah 2d 15, 295 P.2d 1093 (1956).
88. 183 Neb. 784, 164 N.W.2d 441 (1969).
89. 66 Ill. 2d 492, 500, 363 N.E.2d 809, 813 (1977).
90. 493 F.2d 130 (9th Cir. 1974).
91. An additional insured is a person described in the policy who is insured in addition to the named insured. *Keeton, Insurance Law* § 4.1(c) (1971). The most common additional insureds are members of the named insured's household and persons operating the insured vehicle with the permission of the named insured. *Id.* § 4.7 (a). An additional insured has the same duty to cooperate as does the named insured. In Illinois, see *Zitnik v. Burik*, 395 Ill. 182, 69 N.E.2d 888 (1946); *Theetge v. Williams*, 35 Ill. App. 2d 399, 182 N.E.2d 927 (1st Dist. 1968).
Baileres misrepresented to State Farm that he was married to the plaintiff. In reliance on his statements, the insurer suspended its investigation because the insurance policy excluded coverage of interspousal torts. Upon learning the truth, State Farm withdrew from the defense. Examining whether the breach of the cooperation clause actually hampered the insurer in its defense, the court found that State Farm had been prejudiced by its reliance on Baileres's falsehood which prompted it to stop its investigation and by Baileres's failure to attend the trial. The court required neither a showing that the jury would otherwise have found for the defense nor proof of a substantial likelihood that a different result would have resulted if the insured had cooperated.  

The Illinois Supreme Court's reliance on Baumler suggests that it would apply a similar test to determine whether the insurer had been prejudiced by the insured's breach. It is apparent that under the Baumler standards, M.F.A. was not, in fact, prejudiced by Cheek's and Valleroy's misstatements. M.F.A. learned the true facts long before trial and had plenty of time to prepare its defense. Moreover, under the omnibus clause, M.F.A. was liable whichever story was believed.  

The majority in Cheek held that false statements corrected prior to trial are not prejudicial if the insured would have been liable under either set of facts. The court did not state any specific formula to determine what is prejudicial; it merely said what is not prejudicial. Therefore, until an Illinois court finds that an insurer has been prejudiced under a certain set of facts, it will not be clear what is necessary to satisfy the standard.  

CONCLUSION  

Prior to Cheek the only factual issue which arose when an insurer employed a policy defense based on the cooperation clause was whether there was a material and substantial breach. Now the court or jury must also decide whether or not the insurer was prejudiced by the breach. Since the first issue must still be determined, decisions prior to Cheek remain viable. The theory of reciprocal duties and the doctrine of excuse developed by the courts will remain

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92. The Circuit Court of Appeals approved the trial court's instructions to the jury which stated that to constitute a breach of the cooperation clause, the insurer had to prove only that it was probably less able to resist a claim because of the insured's non-cooperation than it would have been had the insured cooperated fully. 493 F.2d at 134.

93. 66 Ill. 2d 492, 497, 363 N.E.2d 809, 811-12 (1977). Under the omnibus clause anyone driving with the permission of the named insured is covered. See note 58 supra and accompanying text.
relevant to the determination of the material and substantial breach question.

Cheek's major significance may not rest solely with its effect upon cooperation clause litigation. Rather, it represents explicit judicial recognition of the public beneficiary doctrine of liability insurance contracts. Under this theory, an injured claimant has rights in liability insurance which are judicially protected and may not be easily defeated. The rights of the injured plaintiff are thereby permitted to encroach on the contractual rights of the insured and the insurer.

Whether the theory of the public beneficiary will be expanded beyond cooperation clause litigation to other areas of insurance law is an open question. The rationale of Cheek may be applicable to policy defenses based on breach of other policy conditions such as the notice clause. The standard policy requires that the insured give notice to the insurer of any accident "as soon as is practicable."94 This has been interpreted to require reasonable notice.95 If the insurer does not get reasonable notice the policy is void.96 Heretofore, Illinois courts have not required the insurer to show prejudice in order to prevail in his policy defense.97 Prejudice is merely one factor which the court or jury may consider in determining whether the notice was reasonable.98 However, the public policy rationale which was the major justification in Cheek appears to be equally applicable to the question of notice.99 The extension of the doctrine seems foreordained.

CHARLES WEBSTER

94. A typical notice clause is as follows: "Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the policy." INSUR. L. REP. (CCH) AUTO. CAS. 2350.
98. Id.