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section 7 was not the mere substitution of a large, powerful firm for a smaller one with a dominant share of a different product market; the "salient characteristic" which gave rise to probable anti-competitive effects was the close relationship of the products. Yet the court, in dismissing the complaint, gave as the reason for its decision its refusal to enunciate a per se rule based on size alone.

In effect, the Court of Appeals appears to have drawn a legal distinction between conglomerate mergers and horizontal mergers. Its reasoning seems to be based on a consideration of conglomerate mergers as a distinct legal category. As viewed by the court, the Federal Trade Commission, by characterizing this merger as conglomerate, has precluded itself from making any effective arguments as to horizontal implications.

Procter & Gamble will be heard by the United States Supreme Court in the current term.[69] Thus, the Court will have an opportunity to make clear what was not made clear in *Consolidated Foods* and *Continental Can*: Does the term *conglomerate merger* denote a separate *legal* classification; or is it merely a convenient *economic* frame of reference?

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FAILURE OF INSURED TO ATTEND TRIAL AS BREACH OF COOPERATION CLAUSE

Today's automobile liability insurance policy contains a standard cooperation clause,[1] a means to secure the insured's cooperation in defending any claim that may arise under the policy. The company may avoid liability if the insured fails to comply with the condition. When an insured has failed to appear at a scheduled trial, in which his insurance company is defending him, the cooperation clause often becomes a critical issue.

Farley v. Farmer's Ins. Exch.[2] illustrates the operation of the cooperation clause when invoked by an insurance company against a third-party claimant. Farley, an Idaho resident, and the insured, a

[69]Procter & Gamble v. FTC, 358 F.2d 74 (6th Cir. 1966), *cert. granted*, 385 U.S. 897 (1966).

[1]The clause in the principal case was as follows: "The insured shall cooperate with the Exchange and, upon the Exchange's request, *shall attend hearings and trials and shall assist* in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance." Farley v. Farmer's Ins. Exch., 415 P.2d 680, 681 (Idaho 1966). (Emphasis added.)

[2]415 P.2d 680 (Idaho 1966).

resident of Idaho employed in Nevada, were involved in an automobile accident in Idaho. The insured notified the insurance company of the facts of the accident. After consultation with the company's attorneys on a number of occasions, the insured agreed to appear at the trial and to come a few days in advance so that he could prepare for the trial with the company's defense counsel.

On the day of the trial there was a snow storm, and the court assumed that the insured was late because of the weather. However, at the end of the plaintiff's evidence the insured had not appeared, and the defense notified the plaintiff that the company was reserving its rights under the cooperation clause if it was later shown that the insured had voluntarily failed to attend trial. The trial resulted in a verdict of $6,859 for the plaintiff.

Eight months after the trial the defendant company located the insured in Lockport, New York, and obtained a statement from him that he voluntarily left his Nevada employ two days before the trial and went directly to New York.

When Farley sued the insurance company on the judgment, the company denied liability, relying on a breach of the cooperation clause as an affirmative defense. The trial court, finding that the defendant had not been prejudiced by the failure of its insured to appear at the first trial, rejected this defense and entered judgment in favor of the plaintiff.

The Supreme Court of Idaho affirmed, saying, "We prefer the modern view which requires the insurance company *to prove prejudice* without the benefit of a presumption." [3] The court reasoned that the burden of proving prejudice was upon the insurance company[4] and would not aid the company by granting it the benefit of a presumption of prejudice.

The court held that although it may be difficult for the insurer to prove prejudice it would be more difficult for the plaintiff to prove lack of prejudice, which would involve proving a negative. Therefore, such a presumption conflicts with "the public policy of this state to secure compensation to the injured victims of negligent drivers," [5] be-

[3] *Id.* at 684 (Emphasis added.)

[4] To reach this conclusion, the court relied on its opinion in Leach v. Farmer's Auto. Interinsurance Exch., 70 Idaho 156, 213 P.2d 920 (1950), where it had earlier ruled on the need to show prejudice. This case, though dealing with a cooperation clause and breach thereof, does not deal with a failure to attend trial. The breach in this case was a failure to give written notice in a reasonable time, although oral notice was promptly given.

[5] 415 P.2d at 684.

cause it throws the onus of proving a lack of prejudice on the plaintiff. Applying these principles, the court found that the company had failed to prove it was prejudiced.

Most courts today agree that it is incumbent upon the insurance company to show that the insured wilfully breached the cooperation clause in a substantial and material way.[6] The courts also agree that there is no breach if there is reasonable excuse for the absence.[7] Once the question of whether the breach was wilful and not based on any reasonable excuse is decided, the court must then consider whether it is substantial[8] or material[9] and whether the insurer has used proper diligence in attempting to bring the insured to trial.[10]

There are three approaches to the problem of determining whether the breach is substantial or material: the proof of prejudice rule; the prejudice per se rule; and the presumption of prejudice rule.

The first approach is the proof of prejudice rule, under which the insurer must prove that the failure of the insured to be in court has substantially prejudiced its defense of the case.[11] The proof of this

[6]See generally 60 A.L.R.2d § 3(a) at 1150.

[7]Failure to appear was excused where the insured feared his job would be jeopardized if he attended, State Farm Mut. Auto. Ins. Co. v. Palmer, 237 F.2d 887 (9th Cir. 1956); and where the insured failed to appear because of an honest mistake as to the date of the trial, Pawlik v. Nichols, 195 F. Supp. 735 (E.D. Ill. 1961). However, the court in Daly v. Employer's Liab. Assur. Corp., 269 Mass. 1, 168 N.E. 111 (1929), held it a breach when the insured claimed nonappearance due to work, since the employer would have consented to his absence.

[8]BLACK, LAW DICTIONARY (4th ed. 1951), defines substantial as "of real worth and importance"; and says that substantial performance "exists where there has been no willful departure from the terms of the contract, and no omission in essential points, and the contract has been honestly and faithfully performed. . . ."

[9]BLACK, LAW DICTIONARY (4th ed. 1951) defines material as "having influence or effect."

[10]State Farm Mut. Auto. Ins. Co. v. Farmer's Ins. Exch., 238 Ore. 285, 387 P.2d 825 (1963); Johnson v. Doughty, 236 Ore. 78, 385 P.2d 760 (1963); Kraynick v. Nationwide Ins. Co., 72 N.J. Super. 34, 178 A.2d 50 (1962).

[11]The court in State Farm Mut. Auto. Ins. Co. v. Koval, 146 F.2d 118, 120 (10th Cir. 1944) gives a general statement of the proof of prejudice rule:

> Under the weight of authority, to constitute a breach of a cooperation clause by the insured, there must be a lack of cooperation in some substantial and material respect that results in prejudice to the insurer; whether there has been such a breach is a question of fact; and such a breach is an affirmative defense, the burden of establishing which rests on the insurer.

Roberts v. Commercial Standard Ins. Co., 138 F. Supp. 363 (W.D. Ark. 1956); American Fire & Cas. Co. v. Vliet, 148 Fla. 568, 4 So. 2d 862 (1941); Jameson v. Farmer's Mut. Auto. Ins. Co., 181 Kan. 120, 309 P.2d 394 (1957); Allen v. Cheatum, 351 Mich. 585, 88 N.W.2d 306 (1958); White v. Boulton, 259 Minn. 325, 107 N.W.2d 370 (1961); Johnson v. Doughty, 236 Ore. 78, 385 P.2d 760 (1963); Oberhansly v. Travelers Ins. Co., 5 Utah 2d 15, 295 P.2d 1093 (1956); Fulkerson v. Iowa Home Mut. Cas. Co., 150 F. Supp. 663 (D. Wyo. 1957).

Accord, Campbell v. Allstate, 60 Cal. 2d 303, 32 Cal. Rptr. 827 (1963) (failure

prejudice is usually a question of fact to be determined by the jury.

Several reasons are advanced in support of the rule. One is that the appearance of an insured in court is not always beneficial to the insurance company because of the insured's potentially disastrous testimony.[12] Also, insurance companies may tend to use the failure of the insured to appear at trial as an easy escape from a case of clear liability.[13]

Underlying the use of the substantial prejudice doctrine is the theory that liability insurance contracts are partially third party beneficiary contracts to be enforced in the public interest for the protection of innocent victims.[14] The primary motive here is the desire to protect the injured. Of the three parties involved, the insured, the disclaiming insurer, and the injured plaintiff, the insurer should be the prime candidate to bear the loss.

The danger in the rule is that if "carried to the point of imposing an almost insurmountable burden of proving that the verdict was the result of the lack of cooperation, it would amount to a perversion of such contractual provision." [15]

The second approach, at the other end of the spectrum, is the prejudice per se[16] rule. The rule requires only that the insurer prove

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of insured to communicate with insurer after receipt of summons); American Fire & Cas. Co. v. Collura, 163 So. 2d 784 (Fla. 1964) (insured made voluntary submission to service of process); Leach v. Farmer's Auto. Interinsurance Exch., 70 Idaho 156, 213 P.2d 920 (1950) (failure to give written notice although oral notice was given); Bernard v. Hungerford, 157 So. 2d 246 (La. Ct. App. 1963) (insured charged with collusion); Schmittinger v. Grogan, 402 Pa. 499, 166 A.2d 524 (1961) (insured failed to cooperate in trial defense); Tierney v. Safeco Ins. Co., 216 F. Supp. 590 (D. Ore. 1963) (applying Washington law) (insured gave false information); Steppich v. Morrison, 12 Wis. 2d 331, 107 N.W.2d 125 (1961) (failure of insured to send summons).

[12]White v. Boulton, 259 Minn. 325, 107 N.W.2d 370, 372 (1961).

[13]Allen v. Cheatum, 351 Mich. 585, 88 N.W.2d 306, 312 (1958). The court discusses the temptation for some companies to subtly encourage "certain of their less desirable risks to 'get lost' and stay lost while at the same time building a plausible if perfunctory record for an ultimate claim of noncooperation." However, it is pointed out in Jameson v. Farmers Mut. Auto. Ins. Co., 181 Kan. 120, 309 P.2d 394, 400 (1957), that collusion works both ways, and the insured and plaintiff might join together to defraud the insurer.

[14]Jameson v. Farmers Mut. Auto. Ins. Co., 181 Kan. 120, 309 P.2d 394, 399 (1957); 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4784 (1962). *But see* Maryland Cas. Co. v. Hallatt, 295 F.2d 64, 70 (5th Cir. 1961), where the court points out that although insurance contracts are to be liberally construed they still must be subject to rules of construction and language applied to other contracts.

[15]8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4773, at 103-09 (1962).

[16]In Potomac Ins. Co. v. Stanley, 381 F.2d 775, 781 (7th Cir. 1960), the court presents the prejudice per se rule as the majority view:

We think the majority view, that the failure of an insured person to attend

the insured has intentionally failed to appear at a scheduled trial without good reason, the company having exercised diligence[17] in attempting to secure the insured's cooperation. When the insurer has succeeded in proving these facts, it will have shown the court that the failure of the insured to appear constitutes a wilful breach of the cooperation clause and will have established prejudice as a matter of law.

The reason for this approach was given in *Polito v. Galluzzo*:[18]

> What that verdict would have been if the insured had attended the trial and testified was a matter of conjecture and surmise; but nevertheless, the insurer was wrongfully deprived of whatever benefit it might have derived from his testimony.[19]

The third approach, the presumption of prejudice rule,[20] is a

a trial and aid in the defense when a case against him is called for trial, is *per se* prejudicial, is consistent with the established principle of Indiana law that one who would seek to enforce a contract for his benefit must show that he has performed all conditions on his part required to be performed as a condition precedent to his right.

Curran v. Connecticut Indem. Co., 127 Conn. 692, 20 A.2d 87 (1941); Schneider v. Autoist Mut. Ins. Co., 346 Ill. 137, 178 N.E. 466 (1933); Beam v. State Farm Mut. Auto. Ins. Co., 269 F.2d 151 (6th Cir. 1959); Polito v. Galluzzo, 337 Mass. 360, 149 N.E.2d 375 (1958); Lenhart v. Rich, 384 S.W.2d 812 (Mo. 1964); Glens Falls Indemn. Co. v. Keliher, 88 N.H. 253, 187 Atl. 473 (1936); Kraynick v. Nationwide Ins. Co., 72 N.J. Super. 34, 178 A.2d 50 (1962).

Accord, Tillman v. Great Am. Indem. Co., 207 F.2d 588 (7th Cir. 1953) (failure to give truthful disclosure of information); State Farm Mut. Auto. Ins. Co. v. Cassinelli, 67 Nev. 227, 216 P.2d 606 (1950) (failure to give notice—condition precedent only). Coleman v. New Amsterdam Cas. Co., 247 N.Y. 271, 160 N.E. 367 (1928) (insured would not give frank disclosure of information); Jamison v. New Amsterdam Cas. Co., 36 Tenn. App. 267, 254 S.W.2d 353 (1952) (failure to give notice); Sears, Roebuck & Co. v. Hartford A & I, 50 Wash. 2d 443, 313 P.2d 347 (1957) (failure to send summons—for conditions precedent only); Ragland v. Nationwide Mut. Ins. Co., 146 W. Va. 403, 120 S.E.2d 482 (1961) (failure to give timely notice).

Some states make a distinction in using the prejudice per se rule when there is a condition precedent only. For a discussion of condition precedent and subsequent in an insurance contract see Houran v. Preferred Acc. Ins. Co., 109 Vt. 258, 195 Atl. 253 (1937).

[17] *Supra* note 10.

[18] 337 Mass. 360, 149 N.E.2d 375 (1958).

[19] 149 N.E.2d at 378.

[20] "That the insurer bears the burden of proving such breach does not alter or destroy the obligation of the opposing party to meet evidence which standing alone makes such prima facie defense." Shalita v. American Motorists Ins. Co., 266 App. Div. 131, 41 N.Y.S.2d 507, 510 (1943).

Formerly the accepted rule in the lower California courts had been the presumption of prejudice rule as represented in Margellini v. Pacific Auto. Ins. Co., 33 Cal. App. 2d 93, 91 P.2d 136 (Dist. Ct. App. 1939); but this was overturned by the California Supreme Court in Campbell v. Allstate Ins. Co., 60 Cal. 2d 303, 32 Cal. Rptr. 827 (1963).

middleground between the proof of prejudice rule and the prejudice per se rule.[21] Under this rule, when the insurance company has proven a wilful failure to attend trial by the insured, without reasonable excuse, a presumption arises that its defense has been prejudiced by such non-cooperation. However, this presumption is not conclusive, and the claimant may rebut it.

> This is probably the better rule, since the insurer does not have the onus of proving that the injured person could not have possibly recovered had cooperation been rendered; yet *in those cases where lack of co-operation was not of decisive importance*, the injured could rebut the presumption.[22]

The rationale underlying the presumption of prejudice view is that it is extremely difficult, but not impossible, to defend a case without the defendant who is usually the chief witness. Insurance companies spend time and money investigating a case and appraising its value to the claimant and the company. One of the duties of a claims adjustor is to evaluate the insured as a potential witness at trial.[23] Before going to trial an insurance company will have evaluated the reliability of the insured and his testimony.

The very fact that the defendant has not appeared in court and the plaintiff has, can only have an adverse effect on the defense's case.

> Every person familiar with the trial of cases by jury knows that the case of an individual defendant is seriously, if not hopelessly, prejudiced by his absence from the trial. Such absence, if not adequately explained, is a circumstance, "chiefly persuasive as distinguished from probative in its effect . . . ," which normally affects the decision of the jury upon all questions submitted to them. Even if the liability of a defendant were admitted or conclusively established, *it cannot be doubted that the mental attitude of the jury in assessing damages would be influenced by his unexplained absence from the courtroom.*[24]

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[21]In Farley, the court cites Cameron v. Berger, 336 Pa. 229, 7 A.2d 293, 296 (1938) as applying the presumption of prejudice rule when in fact the court found a breach as a matter of law. The Supreme Court of Pennsylvania in Schmittinger v. Grogan, 402 Pa. 499, 166 A.2d 524 (1961) cites Cameron in support of its view that the insurance company has the burden of showing substantial prejudice and makes no mention of giving a presumption of prejudice.

[22]8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4773 at 110. (Emphasis added.)

[23]See generally, LONG & GREGG, PROPERTY AND LIABILITY INSURANCE HANDBOOK 714, 720, 1202-03 (1965); MAGEE & BICKELHAUPT, GENERAL INSURANCE 124-31 (7th ed. 1964).

[24]Glens Falls Indem. Co. v. Keliher, 88 N.H. 253, 187 Atl. 473, 476-77 (1936). (Emphasis added.)