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Illinois Coverage Basics

Dealing with an Insured's Refusal to Cooperate: What You Need to Know about the Cooperation Clause in Illinois

Most insurance policies contain a provision requiring an insured to cooperate with the insurer's efforts to investigate and defend covered claims. In the earliest days following notice of a claim, an insured's cooperation is critical, because the insured is the best and sometimes the only source of information concerning a claim until the insurer can conduct an independent investigation. Unfortunately, insureds are not always eager to assist their insurers in the investigation and defense of claims. The question is what can be done about an insured's failure to cooperate?

Illinois courts recognize that the basic purpose of a cooperation clause is to protect the insurer's interests and prevent collusion between the insured and the injured party. M.F.A. Mutual Insurance Co. v. Cheek, 66 Ill.2d 492, 496 (1977). The Illinois Supreme Court has ruled that as a condition of coverage a cooperation clause is "one of great importance" which "imposes a broad duty of cooperation" upon an insured. Waste Management, Inc. v. International Surplus Lines Insurance Co., 144 Ill.2d 178, 192 (1991).

Under Illinois law, an insured's duty to cooperate is considered to be so important that it will trump the insured's right to maintain the confidentiality of communications with the insured's own attorney. Id. In Illinois, an insured must provide its insurer with information that is relevant to a claim, regardless of the attorney-client privilege.

Nevertheless, the burden of proof with respect to a cooperation clause defense rests upon the insurer. M.F.A. Mutual, supra. Unless an alleged breach of a cooperation clause substantially prejudices the insurer in defending the underlying action, it is not a defense to coverage under the policy. M.F.A. Mutual, 66 Ill.2d at 498-499. There is no presumption that an insurer is prejudiced by an insured's breach of its duty to cooperate. Id. To the contrary, proof of substantial prejudice requires an insurer to demonstrate that it was actually hampered in its defense by the insured's violation of the cooperation clause. Id. Merely trivial, technical or inconsequential violations of a cooperation clause will not provide a defense to an insurer. State Farm Fire & Casualty Co. v. First National Bank & Trust, 2 Ill.App.3d 768, 773 (3rd Dist. 1972); M.F.A. Mutual Insurance Co. v. Cheek, 34 Ill.App.3d 209, 213 (5th Dist. 1975), *aff'd* 66 Ill.2d 492, 496 (1977).

To answer the question of whether an insured violated its duty to cooperate requires inquiry into the good faith exercised by the insurer and by the insured. Lappo v. Thompson, 87 Ill.App.3d 253, 254-255 (1st Dist. 1980). An insurer must prove by a preponderance of the evidence that it acted in good faith to secure the cooperation of the insured and that the insured's failure to cooperate was deliberate. Id.; Wallace v. Woolfolk, 312 Ill.App.3d 1178, 1180 (5th Dist. 2000).

An insurer is not liable for a judgment rendered against its insured if the insured willfully failed to cooperate. However, the insurer is liable if it was not sufficiently diligent in attempting to secure the insured's cooperation. Id.

A cooperation clause defense almost always involves a question of fact, which cannot be resolved by summary judgment. Hartshorn v. State Farm Insurance Co., 361 Ill.App.3d 731, 733-734 (2nd Dist. 2005). A recognized exception to that general rule is that an insurer is entitled to summary judgment when the insured has made no effort to produce requested information. Id. Surprisingly, not even an insured's failure to appear at trial will automatically entitle an insurer to judgment on a failure to cooperate defense. *See* Buckner v. Causey, 311 Ill.App.3d 95 (1st Dist. 1999); Murphy v. Clancy, 83 Ill.App.3d 779 (1st Dist. 1980). In short, it is not easy for an insurer to prove a lack of cooperation defense under Illinois law.

The most infamous Illinois cooperation clause case is Wallace v. Woolfolk, supra. In the Wallace case, Woolfolk was sued for her involvement in an auto collision. Her liability insurer was Gallant Insurance Company. Over the next few months the attorneys who were retained by Gallant Insurance to defend Woolfolk sent her six letters advising her of critical litigation dates, and they had one telephonic conversation with her in which she agreed to attend her discovery deposition. After Woolfolk failed to appear at her deposition, the court struck her pleadings and barred her from rejecting a mandatory arbitration award. Gallant resisted a garnishment action based upon Woolfolk's repeated violations of the cooperation clause of the Gallant policy, but the trial court ruled that Gallant's affirmative defense was legally insufficient.

The Appellate Court in Wallace agreed with the trial court that the insurer had failed to prove the cooperation clause defense. The Appellate Court ruled that "merely sending letters to its insured was not enough to satisfy Gallant's duty to seek its insured's cooperation." Wallace, 312 Ill.App.3d at 1183. Although defense counsel sent six letters to the insured and spoke to her on the telephone before the entry of the default judgment, the Appellate Court held that those efforts were insufficient because defense counsel "had reason to know that its insured either was not receiving these letters *or was ignoring them*." Id., emphasis added. In affirming the trial court's judgment, the Appellate Court specifically found that the insurer had not exercised sufficient diligence to secure the cooperation of its insured to permit the insured to assert the lack of cooperation as a defense to coverage. Id.

The severity of the Wallace ruling may be an aberration, but the Appellate Court's opinion in Wallace provides important guidance nonetheless. Sending letters to an unresponsive insured will not advance an insurer's failure to cooperate defense. More is required. Obtaining evidence of delivery and receipt of such letters will help. Telephone contacts with the insured and detailed follow-up documentation will help even more. Face-to-face contact with the insured to establish that the insured understands its obligations, with witnesses and follow-up documentation, will help the most. To establish a valid defense, the insurer must develop admissible evidence that the insured knew what it was expected to do and that its failure to cooperate was deliberate.

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If you have questions or would like to discuss the implications of this report further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison, Suite 2200, Chicago IL 60606; 312-332-8494; jkh@crayhuber.com.