INSURANCE

AUTOMOBILE INDEMNITY — STATUS OF THE INSURED DEFENDANT

The plaintiffs, as executors of the decedent, had recovered a judgment against the insured for injuries, resulting in the death of the decedent. The injuries were alleged to have been caused by the negligence of the insured, in the operation of his automobile in which the decedent was a passenger. The judgment was not paid and the plaintiffs brought an action against the defendant, Ohio Casualty Insurance Co., the insurer of the automobile owned and driven by the insured when the accident occurred. The defendant pleaded as a defense the breach of a clause in the insurance policy, requiring the insured to cooperate with the insurer in preparing a defense to an action by the injured party. The plaintiffs recovered a judgment for the full amount in the Common Pleas Court. The Court of Appeals, upon appeal, reversed the trial court on the ground that the finding that there was not a lack of co-operation on the part of the insured was manifestly against the weight of the evidence. Upon a motion to certify, the Supreme Court took the case and affirmed the Court of Appeals entering final judgment for the defendant. *Luntz* v. *Stern,* 135 Ohio St. 225, 20 N.E. (2d) 241, 14 Ohio O. 62 (1939).

The plaintiffs brought their action by a supplemental petition, basing their rights on Sections 9510-3 and 9510-4 of the Ohio General Code, which gives the injured party a direct action against the insurer to recover the insurance money. A condition to bringing the action is a judgment against the insured. *Steinbach* v. *Maryland Casualty Co.,* 15 Ohio App. 392 (1921); *Canen* v. *Kraft, et al.,* 41 Ohio App. 120, 180 N.E. 277 (1931). Prior to the enactment of this statute, most policies of automobile insurance contained a provision that the insurer should be liable only in cases where the insured had actually paid a judgment obtained against him. The usual interpretation was that such a policy was one of indemnity against loss, not against liability, and payment of a judgment by the insured was a condition precedent to recovery from the insurer. Any provision like this in a policy at the present time would be under the statute. *Stacey* v. *The Fidelity and Casualty Co. of N. Y., et al.,* 114 Ohio St. 633, 151 N.E. 718, 21 Ohio App. 70, 152 N.E. 794 (1926); *Lorando* v *Gethro,* 228 Mass. 181, 171 N.E. 185, 1 A.L.R. 1374 (1917); *Verducci* v. *Casualty Co. of America,* 96 Ohio St. 260, 117 N.E. 235 (1917). The liability of the

insurer is, however, no greater than the liability to the insured. The insurer has any defense that ordinarily would be available to it in an action by the insured on the policy. *Royal Indemnity Co.* v. *Watson,* 61 Fed. (2d) 614 (Alabama, 1932); *Storer* v. *Ocean Accident and Guarantee Corp.,* 80 Fed. (2d) 470 (Ohio, 1935). The defense frequently relied upon by the insurer to defeat the injured party's action is a breach of the co-operation clause by the insured. Since the liability of the insurer is conditional upon this co-operation, the question of whether there has been a breach of the condition is vital. An immaterial breach of this condition, causing no prejudice to the insurer, will not operate to defeat the insured's rights under the contract. *George* v. *Employer's Liability Ass. Corp., Ltd.,* 219 Ala. 307, 122 So. 175, 72 A.L.R. 1438 (1929); *Conroy* v. *Commercial Casualty Ins. Co.,* 292 Pa. 219, 140 Atl. 905 (1928); 72 A.L.R. 1455. However, the failure to perform an act specifically required, or a wilful non-compliance with the terms of the co-operation clause is a material breach, and the fact that the insurer is not prejudiced thereby is immaterial. As in the principal case the insured wilfully refused to sign an answer prepared by the insurer. *Coleman* v. *New Amsterdam Casualty Co.,* 247 N. Y. 271, 160 N.E. 367, 72 A.L.R. 1443 (1928). Upon the occurrence of an accident the insured is required by an express provision in most policies, to send immediate notice thereof to the insurer. *The State Auto Mutual Ins. Assn.* v. *Friedman,* 34 Ohio App. 551, 171 N.E. 419 (1929); *Decker* v. *Kolleda,* 57 Ohio App. 442, 14 N.E. (2d) 417, 26 Ohio L. Abs. 313, 11 Ohio O. 124 (1937); *United States Casualty Co.* v. *Breese,* 21 Ohio App. 521, 153 N.E. 206, 3 Ohio L. Abs. 183 (1925). As to what constitutes immediate notice will depend upon the circumstances. *The Travellers Ins. Co.* v. *Meyers and Co.,* 62 Ohio St. 529, 539, 57 N.E. 458 (1900); *Purefoy* v. *Pacific Auto Indemnity Exchange,* 91 Cal. 91, 53 Pac. (2d) 155 (1935), noted in 24 Cal. Law Rev. 476 (1936). The courts are usually strict in construing this provision because it is essential that the insurer know about the accident in time to prepare a defense to any suit that may be brought. Most courts would agree that failure to give notice until after judgment has been entered in favor of the injured party would be a material breach. Insured is then under a duty to make a fair and frank disclosure of information demanded by the company to enable it to determine whether there is a genuine defense. Insured is not required to join in the presentation of a sham defense, but is required to act with the utmost honesty and good faith. Aiding and abetting the plaintiff in bringing an action was held to be evidence of bad faith in the principal case.

Coleman v. *New Amsterdam Casualty Ins. Co.*, 247 N. Y. 271, 160 N.E. 367, 72 A.L.R. 1443 (1928); *Rohlf* v. *The Great American Mutual Indemnity Co.*, 27 Ohio App. 208, 161 N.E. 232, 25 Ohio Law Rep. 638 (1927). A failure to forward pleadings immediately, in violation of a condition in the policy, is of the essence and a delay of five months has been held a breach voiding the policy. *Heller* v. *Standard Accident Ins. Co.*, 27 Ohio App. 405, 5 Ohio L. Abs. 354 (1927). The insured may also be required to give the names of witnesses and secure any available evidence which will assist in making a legitimate defense to the action against him. The insured flatly refused to do this in the principal case even though the insurer often requested him to do so. The intentional falsification of any of these matters vital to the defense is a violation of the co-operation clause. However, slight variations have been deemed immaterial. *Riggs* v. *New Jersey Fidelity and Plate Glass Co.*, 126 Or. 404, 270 Pac. 479 (1928). A false statement as to who was driving the car at the time of the accident has been held enough to show lack of co-operation as a matter of law. *Ada D. Rochon* v. *The Preferred Accident Ins. Co., of N. Y.*, 114 Conn. 313, 158 Atl. 815 (1932); *Storer* v. *Ocean Accident and Guarantee Corp., Ltd., et al.*, 80 Fed. (2d) 470 (Ohio, 1935). Whether or not the insured's failure to attend the trial of an action against him is lack of co-operation will depend upon several factors. The insured must attend the trial if requested to do so by the insurer. *Moses* v. *Ferrel Indemnity Co. of America*, 97 Pa. Super. Ct. 13 (1929). If he has left the jurisdiction before the trial, his good or bad faith will determine how far he will be excused from attending. If the insured is absent in good faith, the insurer must pay the traveling expenses necessary for him to attend. And a failure to do so will excuse the breach. *The Medical Protective Co.* v. *Light, Admr.*, 48 Ohio App. 508, 149 N.E. 446, 1 Ohio O. 67 (1934); *American Casualty Co.* v. *Tiberio*, 17 Ohio L. Abs. 410 (1934). There is a positive duty on the insured to keep the insurer notified as to his whereabouts and a failure to notify the insurer of a change in address is a breach even if done in good faith. *Rohlf* v. *The Great American Mutual Indemnity Co., supra.* It is not enough for the insured merely to appear at the trial, but he must testify if the insurer requests him to do so. *Henry C. Francis* v. *London Guarantee and Accident Co.*, 100 Vt. 425, 138 Atl. 780 (1927). The giving of truthful testimony is all that is required. A confession of negligence if given truthfully does not constitute a violation of the co-operation clause. *Aime Guerin* v. *The Indemnity Ins. Co. of North America*, 107 Conn. 649, 142 Atl. 268 (1928); 72 A.L.R. 1466. A false

statement made at the trial of the insured cannot be corrected by a true statement at the trial of the insurer and if the insurer is prejudiced it will be a material breach. *Storer* v. *Ocean Accident and Guarantee Corp., supra.* In the principal case the insured, at the first trial, testified that he was driving on the wrong side of the road. At the second trial he testified that he was driving on the right side of the road. But a self contradiction may not constitute lack of co-operation. A failure to co-operate is not shown by the fact that the insured gave different testimony at the trial from statements he signed at the request of the attorney for the insurer, which falsely narrated the circumstances favorable to the insurer. *Yorkshire Indemnity Co.* v. *Rohrkemper,* 20 Ohio L. Abs. 11 (1935).

While any material breach of the co-operation clause will, if proved, release the insurer, the hardship resulting to the insured is somewhat mitigated by a liberal use of the doctrines of waiver and estoppel. If, before or during the trial of the injured party against the insured, the insurer discovers any facts amounting to a breach of the co-operation clause, it waives the defense by assuming or continuing the defense of the insured. *Martin Clarke* v. *Alexander Enders, et al.,* 43 Ohio App. 253, 28 Ohio N.P. (N.S.) 596 (1931). The insurer may, however, with the consent of the insured reserve litigation of the question of non-co-operation until later.

It is truly a hardship for an insured defendant to lose the protection of his insurance by the lack of co-operation on his part. But the extent of the hardship can best be seen by an examination of the factors which may have contributed to the recovery of a judgment against the insured. The overwhelming majority of the courts have held that it is the right of the counsel for the plaintiff, in a personal injury case, to examine prospective jurors upon their *voir dire* as to their interest in or connection with a liability insurance company. 56 A.L.R. 1456 (1928); 74 A.L.R. 860 (1931); 95 A.L.R. 404 (1935). The Ohio Supreme Court held in accord with this view in the case of *Dowd-Feder* v. *Truesdell,* 130 Ohio St. 530, 200 N.E. 762, 5 Ohio O. 179 (1936), noted in 2 O.S.L.J. 318. The right to ask these questions on the *voir dire* is supported on the ground that the plaintiff is entitled to an unbiased jury. While this may be a meritorious contention it cannot be denied that a jury is more likely to render a verdict against an insured defendant than one who is not insured. "Experience has shown that parties insured for $5,000 frequently are subjected to verdicts for $10,000, $15,000 or more." Chief Justice Marshall, dissent in *Pavilonis* v. *Valentine,* 120 Ohio St. 154, 171, 165 N.E. 730, 27 Ohio App. 26 (1929). How-

ever strict the courts are in requiring good faith in asking these questions the defendant is bound to feel the full force of the resultant implications.

Another well settled principle may become a factor when the insured defendant is a joint tortfeasor and is sued alone because the injured party knows that he has insurance. There is a general rule of the common law that no right of contribution exists between persons whose concurrent negligence has made them liable in damages. *Royal Indemnity Co.* v. *Becker, et al.*, 122 Ohio St. 582, 173 N.E. 194, 34 Ohio App. 544, 30 Ohio Law Rep. 647, 75 A.L.R. 1481 (1930); *U. S. Casualty Co.* v. *The Indemnity Ins. Co. of North Amer.*, 129 Ohio St. 391, 195 N.E. 850, 2 Ohio O. 392 (1935); *J. W. Doles, Admr. of Frank Brown* v. *Seaboard Airline Ry. Co.*, 160 N.C. 318, 75 S.E. 722, 42 L.R.A. (N.S.) 67 (1912). There is a growing tendency to distribute more justly the loss in negligence cases by legislation. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS, p. 20 (1936). However, until the states see fit to adopt such laws, the insured joint tortfeasor, who is sued alone and breaches the co-operation clause, will have to bear the whole loss.

A further factor is present when the injured party is a guest of the insured and bases his right to recover on the guest statute. Under Ohio's Guest Statute, G.C. sec. 6308-6, the guest can only recover for wilful and wanton misconduct on the part of the owner or operator. In connection with the guest statute see, Effect of the Passenger-for-Hire Clause on Scope of Protection Under Automobile Insurance Policies, Comment (1939) 37 Michigan Law Rev. 920. As most policies of liability insurance only cover injuries accidentally sustained, the interpretation of wilful and wanton misconduct becomes important. In the case of *Herrell* v. *Hickok*, 133 Ohio St. 66, 11 N.E. (2d) 869 (1937), noted in 5 O.S. L.J. 110, the trial court held that injuries caused by the wilful and wanton misconduct of the insured were not accidentally sustained as required by the policy. Upon appeal, the Court of Appeals reversed the trial court and held that such injuries were accidentally sustained. *Herrell* v. *Hickok*, 57 Ohio App. 213, 13 N.E. (2d) 358 (1937). The Supreme Court affirmed the Court of Appeals but did not decide whether wilful and wanton misconduct could result in accidental injuries. In the similar case of *American Casualty Co.* v. *Brinsky et al.*, 51 Ohio App. 298, 5 Ohio O. 146, 200 N.E. 654 (1934), the Court of Appeals held *contra* to the decision of the *Herrell* case, *supra*. It is easy to see the precarious position of the insured defendant in such a situation. As previously pointed out, the known presence of an insurance company will make it more likely that the injured guest will recover

a judgment, which may be greater than the amount of the insurance carried. Until the Supreme Court in the case of *Rothman* v. *Metropolitan Ins. Co.*, 134 Ohio St. 241, 12 Ohio O. 50, 16 N.E. (2d) 417, 117 A.L.R. 1169 (1938), settled the question and held that wanton misconduct could result in accidental injuries, the insured defendant was in danger of losing his insurance because of wanton misconduct, and therefore be liable for the full amount of the judgment recovered against him.

From the foregoing considerations it may be concluded that the insured cannot be too diligent in fulfilling conditions vital to his recovery on the policy. Too often, as in the principal case, the insured believes that payment of premiums is all that is required of him.

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SALES

THE "FLOOR PLAN RULE" IN OHIO

Plaintiff brought action for conversion of an automobile, claiming title by virtue of a chattel mortgage executed to it by a retail dealer. Defendant, another retail dealer, claiming that he had purchased the car from the retail dealer who had previously executed the mortgage in question to the plaintiff, contended that the so-called *Floor Plan Rule* operated to protect his purchase, which was made subsequent to the execution of the mortgage in question. The mortgage had been properly recorded but the defendant had purchased in good faith with no actual knowledge of the encumbrance. The trial court, upon submission of the issue, found for the defendant. Upon appeal, the finding was reversed and judgment was entered for the plaintiff, the Court of Appeals holding that the rule does not operate to protect a retail dealer against a chattel mortgagee when the purchase is made from another retail dealer at wholesale. *The Colonial Finance Co.* v. *McCrate*, 60 Ohio App. 68, 19 N.E. (2d) 527, 27 Ohio L. Abs. 673, 13 Ohio O. 307 (1938).

At the common law, the generally pronounced rule of chattel property was that a seller could convey no greater title than he himself possessed even to a *bona fide* purchaser without notice of the defect in the seller's title.[1] The rigors of the application of the rule engendered a number of exceptions. Thus, in England, it was early held that no such claim could be countenanced against the buyer at sale in the market

[1] 2 Kent's Com. 262; *Roland* v. *Gundy*, 5 Ohio, 202 (1831); *Sanders* v. *Keber et al.*, 28 Ohio St. 630 (1876).