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Insurance--Insured's Breach of Cooperation Clause

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ity as individuals. Note, 68 YALE L.J. 1182 (1959). There is nothing in Rule 17(b) that limits the right to bring a class action under Rule 23 in a proper case. *Tunstall v. Brotherhood of Locomotive F. and E., supra.* In fact, one of the policies of Rule 23 was to make suits against unincorporated associations procedurally possible in federal courts. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 GEO. L.J. 551 (1937).

Therefore, in a state that allows a union to be sued as an entity the right of the union members to sue as a class should not be limited by the capacity provision of Rule 17(b). However, if the state permits only a representative action, as in West Virginia, federal jurisdiction should not permit an entity action in the federal court. Unlike West Virginia, the union in Pennsylvania should have a choice of bringing suit as an entity or having members bring a class action in the federal courts. There seems little reason for denying the convenience of the federal class action because a state court in the forum state would permit the action to be brought by the union as an entity.

In rendering its judgment in such actions the court must obviously take cognizance of the state substantive law which may indeed be affected by the distinction between the class and entity action in the state courts. This seems a necessary implication of the "Erie Doctrine." *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). Nonetheless, the convenience and accessibility of the federal forum should not turn on state law in such situations.

Thus, in the principal case, assuming Pennsylvania law is procedural, the plaintiffs should be successful in their suit if rather than suing the union as an entity they would have sued the members of the union as a class and would have chosen the representatives of that class who have residency in West Virginia.

Boyd Lee Warner

Insurance—Insured's Breach of Cooperation Clause

P, an insurance company, sought a declaratory judgment to determine liability under an omnibus insured clause of an automobile liability policy. *P* insured the owner of the car. The owner and her daughter were injured in an accident at which time her husband,

D, was driving. In a separate proceeding in Tennessee she sued *D* for her injuries and as next friend for her daughter's injuries. *D* voluntarily submitted to service of process in Tennessee, a foreign jurisdiction, by a collusive agreement with his wife's attorneys because the attorneys thought Tennessee would be a more favorable forum. *D* was not otherwise amenable to process in that state. *P* then instituted this action for a declaratory judgment. The federal district court held that *P* had waived its defense of breach of the cooperation clause because of its prior defense of *D*. *P* appealed. *Held,* reversed. *P* was not liable under the omnibus insured clause because the husband's act constituted a breach of the cooperation clause, this being a failure to fulfill a condition upon which *P's* obligation was dependent, and that *P's* acts did not constitute a waiver. *Mayflower Ins. Co. v. Osborne,* 326 F.2d 461 (4th Cir. 1964).

The cases on the question of failure of cooperation by the insured reflect a confusing diversification as to the degree of non-cooperation constituting a breach of the cooperation clause. The principal case, based on Virginia law, held that it was not necessary for the insurer to show prejudice, but only that the non-cooperation be substantial and material. The court relied upon *Cooper v. Employers Mut. Liab. Ins. Co.,* 199 Va. 908, 103 S.E.2d 210 (1958), for this proposition. In the *Cooper* case the insured notified the insurer of the accident, but failed to cooperate beyond this point. He did not forward suit papers as required and also changed his address after the accident without notifying the insurer. He did not assist in trial preparations nor was he present for the trial. The court found these acts to be prejudicial, not just substantial.

The court also cited *State Farm Mut. Auto. Ins. Co. v. Arghyris,* 189 Va. 913, 55 S.E.2d 16 (1949), which is authority for the proposition that actual prejudice need not be shown so long as the breach is material. The trial court held in that case that the insured's acts had not prejudiced the insurer and that the company was liable. Upon appeal the court held that the insured's acts were material in that he had mislead the company for many months, had failed to claim protection of the policy, and had denied the insurer's liability. Thus the insurer was prevented from making a proper investigation with the aid of the insured. In light of all these facts the court apparently agreed with the trial court's holding that the insurer had not been prejudiced, but reversed the holding because

it thought the acts were material. From the facts of the principal case and the cases cited it is difficult to perceive a workable distinction between a prejudicial act and one which is material and substantial.

The district court in the principal case recognized that prejudice to the insurer is required by the majority of the courts. *Mayflower Ins. Co. v. Osborne,* 216 F. Supp. 127 (W.D. Va. 1963). Annot., 60 A.L.R.2d 1146, 1154. West Virginia apparently is in line with the majority. In *Marcum v. State Auto Mut. Ins. Co.,* 134 W. Va. 144, 59 S.E.2d 433 (1950), the West Virginia court held that prejudice must be shown. The insured to aid service of the process drove into West Virginia and was then served. The accident had occurred in West Virginia and under the Non-Resident Motorist Statute, W. VA. CODE ch. 56, art. 3, § 31, (Michie 1961), a foreign motorist is amenable to process by substituted service on the auditor. The court would have had jurisdiction over the insured by this provision so in fact this act was not prejudicial. The court used no contradictory language as used in the principal case.

A realistic approach to the matter was taken by the Supreme Court of Errors of Connecticut in *Curran v. Connecticut Indem. Co.,* 127 Conn. 692, 20 A.2d 87 (1941). The insured failed to notify the insurer of the proceeding against him and failed to appear to defend, resulting in a default judgment against him. The action against the insured was brought by a passenger in the insured's automobile and the defense of assumption of the risk could have been asserted by the insured. The court upon deciding that a breach had occurred held that in the absence of a waiver by the insurer, the insurer's obligation may be terminated so long as the act by the insured was material. The court stated that the lack of prejudice to the insurer is the test which determines whether failure to cooperate concerns a material or an immaterial matter.

Because of the conflicting interests involved in cases of this nature, it is important for the courts to take a clear cut approach. On the one hand liability policies serve the public interest by protecting the innocent users of the highways. For this reason the companies should not be allowed to deny liability because of mere trivialities. On the other hand the insurers have a contract right which must be protected. The company which is not assured of material cooperation by the insured must also take this into account when setting

the rates. An approach as taken by the Connecticut court in the *Curran* case, *supra,* certainly appears to be a sound answer to the problem.

Charles Ellsworth Heilmann

Security Transactions—Uniform Trust Receipts Act

P, a credit corporation, purchased a new automobile from the manufacturer. Pursuant to a trust receipt plan between a new car dealer and *P,* the vehicle was delivered to the dealer. Dealer executed a trust receipt on the vehicle naming *P* entruster and dealer trustee. Dealer at the same time executed a promissory note for the value of the vehicle and gave it to *P.* P had previously filed a statement of trust receipt financing with the Secretary of State of West Virginia in conformity with the Uniform Trust Receipts Act, W. VA. CODE ch. 38, art. 15, § 13 (Michie 1961). Dealer, without having discharged the obligation owing *P,* secured a loan from *D,* a bank. Dealer executed a promissory note to *D* and gave a chattel deed of trust on the vehicle. Dealer then made application for certificate of title to the vehicle, fraudulently purporting to be the owner, but requesting the lien in favor of *D* be shown on the title. The title was issued and sent to *D. P* repossessed the vehicle and instituted this suit for declaratory judgment. The trial court found for *D. Held,* reversed. *P* was the actual owner of the vehicle, not a lienor, and its interest in the vehicle was protected by filing under Uniform Trust Receipts Act. *Commercial Credit Corp. v. Citizens Nat'l Bank,* 133 S.E.2d 720 (W. Va. 1963).

In the principal case *D* took the position that it should prevail by reason of having its lien noted on the certificate of title as required by W. VA. CODE ch. 17A, art. 4A, § § 3 and 5 (Michie 1961). Filing under this provision is adequate notice to creditors and purchasers from the time of filing. No other recordation is required or of any effect. *D* contended that *P,* having failed to have its lien reflected on the certificate of title, should not be protected.

The court exposed a fatal flaw in *D's* argument by declaring that under the Uniform Trust Receipts Act, W. VA. CODE ch. 38, art. 15 (Michie 1961) *P* was not a "lienor," but the "real and actual owner" of the vehicle. *Accord, Commercial Credit Co. v. Interstate Securities Co.,* 197 S.W.2d 1000 (Mo. 1946); *General Motors*