

THE PENALTY FOR FAILING TO SUBMIT TO AN EXAMINATION UNDER OATH

James E. DeFranco*

I. INTRODUCTION: THE PROBLEM

When an insurer receives a claim for damage to property, the insurer's adjusters gather information from a variety of sources to determine the insurer's rights and obligations under the policy. The insurer may obtain information from the insured through informal conversation, recorded statements, requests for documents, or examinations under oath. Most property insurance policies contain provisions requiring the insured to provide information for the insurer's investigation. The reason is simple: "Typically the insurer has little or no knowledge of the facts surrounding a claimed loss, while the insured has exclusive knowledge of such facts. The insurer is, therefore, dependent on its insured for fair and complete disclosure; hence, the duty to cooperate."¹

Insureds with questionable or fraudulent losses may not wish to disclose all facts within the insured's knowledge since doing so might provide the insurer with the information necessary to determine that the insured did not suffer a covered loss, the insured procured the loss, or the extent of the insured's loss is not as great as claimed. Some insureds refuse to comply with policy requirements by failing to fully and timely respond to an insurer's request to produce documents or submit to examinations, asserting a variety of excuses along the way for their refusal to comply.

The problem many insurers face is that some courts refuse to enforce any meaningful sanction against noncompliant insureds, thus encouraging insureds and their counsel to delay compliance as long as possible and comply only partially when required to do so. The courts have provided various means of protecting noncompliant insureds, many of which have the effect of eviscerating the policy provisions requiring compliance. More recently, however, some courts have recognized that letting uncooperative insureds off the hook encourages noncompliance and serves to protect

* James E. DeFranco graduated from Southern Illinois University School of Law (Magna Cum Laude) in 1981 and has written and lectured on the topics of insurance coverage and insurance fraud for three decades. He authored the book *Examinations Under Oath* and hosts the website examinationsunderoath.com.

1. *Piser v. State Farm Mut. Auto. Ins. Co.*, 938 N.E.2d 640, 647 (Ill. App. Ct. 2010) (quoting *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 333 (Ill. 1991)).

insureds with questionable or fraudulent claims at the expense of innocent insureds.

An analysis of earlier decisions reveals that certain cases have unfortunately relied upon unworkable analogies to liability policies that have no proper application to first party insurance claims. Indeed, the provisions requiring insureds to produce documents, give recorded statements, and submit to examinations under oath are not substantially similar to “cooperation” clauses found in liability policies. An analysis of the competing policies and interests of insurers, the insured making a property damage claim (or similar claim, such as a personal injury protection claim), and the interests of all policyholders in keeping premiums reasonable by eliminating fraud and abuse, reveals a more workable framework for determining the appropriate penalty to impose when an insured fails to produce documents or submit to examinations under oath.

II. CURRENT SOLUTIONS

States impose a variety of different penalties against insureds who fail to cooperate, ranging in severity from holding an insured’s claim in abeyance until the insured cooperates (the proverbial “slap on the wrist”) to finding that noncooperation constitutes an absolute bar to recovery under the policy.

A. Abeyance: A Timeout for the Insured

Several courts have held that the failure to submit to an examination under oath in accordance with the provisions of the policy does not forfeit or void the contract and bar recovery, but merely suspends the right of recovery until the insured complies with the contractual provision. In *Aachen & Munich Fire Insurance Co. v. Arabian Toilet Goods Co.*,² the court noted that the failure or refusal of the insured to submit to an examination under oath under the usual stipulations of a policy containing such a requirement does not constitute a forfeiture of the policy, but only excuses the insurer of the obligations to pay the claim until the insured complies with the condition.³ In that case, the insured had two insurance policies with two separate insurers and, after giving an examination under oath to one insurer, refused to give another one to the second insurer.⁴ The insured claimed that the attorney who took the first examination under oath

2. 64 So. 635 (Ala. Ct. App. 1914).

3. See generally *id.*

4. *Id.* at 636.

“profess[ed] to act as the attorney of both [insurance] companies.”⁵ According to the court, the insured could have reasonably believed that it was complying with the policy provisions of both policies at the time the insured gave the initial examination under oath and, therefore, was not intentionally refusing to cooperate with the insurer.⁶

In *Driggers v. Philadelphia Underwriters Agency of Fire Insurance Ass'n of Philadelphia*,⁷ the court held that an insured's failure to submit to an examination under oath merely suspended the right to file suit until the insured complied with that requirement and thus should be pled as an abatement and not a bar to suit.⁸ In *Pogo Holding Corp. v. New York Property Insurance Underwriting Ass'n*,⁹ the court acknowledged that the insured's failure to submit to an examination under oath constituted a material breach of the policy, but found itself “reluctant to exact the extreme penalty of the dismissal of the action, without affording the [insured] the last opportunity to perform in accordance with the policies' provisions.”¹⁰ Instead, the court granted the insured thirty days to comply with the policy provisions.¹¹

In *State Farm General Insurance Co. v. Lawlis*,¹² the court held that a policy provision prohibiting suit or action on the policy unless all of the requirements of the policy have been complied with was valid.¹³ The court explained that the remedy to enforce the condition precedent is “abatement rather than bar.”¹⁴

B. Absolute Bar to Recovery

Other courts have taken a more stringent view. In *Anderson v. American & Foreign Ins. Co.*,¹⁵ the court held that if a policy provides that the effect of failing to comply with the contractual provisions is to render the policy “null and void,” the insured's failure to comply with the policy by refusing to answer a number of questions propounded to him, which were material to the insurer's investigation and coverage decision, could not be disregarded, and the insured's noncompliance constituted a bar to recovery under the policy.¹⁶

5. *Id.*

6. *Id.*

7. 240 S.W. 618 (Tex. Civ. App. 1922).

8. *Id.* at 620-21.

9. 422 N.Y.S.2d 123 (N.Y. App. Div. 1979).

10. *Id.* at 123.

11. *Id.*

12. 773 S.W.2d 948 (Tex. Ct. App. 1989).

13. *Id.* at 949.

14. *Id.*; see also *In re Foremost Cnty. Mut. Ins. Co.*, 172 S.W.3d 128, 134 (Tex. Ct. App. 2005).

15. 86 So. 2d 303 (Miss. 1956).

16. *Id.* at 304.

In holding that an insured's noncompliance with a policy's cooperation clause constitutes a bar to recovery, numerous courts have refused to allow insureds the opportunity to cure prior noncompliance by belatedly submitting to examinations under oath or producing requested documents. In *Pisa v. Underwriters at Lloyd's*,¹⁷ the insured failed to produce financial records that the policy required him to provide.¹⁸ The court held that the insured's offer to produce records and sign an authorization for financial documents after the defendant filed a motion for summary judgment was too late:

It is too late now for Pisa to start cooperating. A Rule 56 motion puts an end to pre-trial maneuvering and compels the litigants to show the Court what they can prove at trial. The rule gives the plaintiff a deadline to come forth with his case, and it provides the strict penalty of dismissal for those who cannot prove a case. Delaying the performance of his contractual obligations in the apparent hope that he would not have to disclose damaging information, Pisa has missed his chance.¹⁹

In *Lentini Brothers Moving & Storage Co. v. New York Property Insurance Underwriting Ass'n*,²⁰ the New York Supreme Court, Appellate Division, held that the insured's failure to appear for an examination under oath on the date demanded by the insurer constituted "an absolute defense" and justified summary judgment in favor of the insurer on the suit brought by the insured for recovery under the policy.²¹ The court further held that the insured's submission to a deposition under the rules of civil procedure during the course of the lawsuit filed by the insured did not cure the insured's contractual default in failing to appear for the examination under oath before the suit was filed.²² Similarly, in *Abudayeh v. Fair Plan Insurance Co.*,²³ the court held that the insured's failure to submit to an examination under oath is an absolute defense to a claim under the insurance policy and the insured would not be permitted to cure the breach by submitting to an examination as part of pre-trial discovery.²⁴

In *Williams v. American Home Assurance Co.*,²⁵ the insured appeared for an examination under oath but refused to answer certain questions and failed to furnish pertinent documents requested by the insurer.²⁶ The court

17. 787 F. Supp. 283 (D.R.I. 1992).

18. *Id.* at 285.

19. *Id.* at 286.

20. 428 N.Y.S.2d 684 (N.Y. App. Div. 1980).

21. *Id.* at 687.

22. *Id.* (citing *Waugh v. Firemen's Fund Ins. Co.*, 275 N.Y.S.2d 91 (N.Y. Sup. Ct. 1966)).

23. 481 N.Y.S.2d 711 (N.Y. App. Div. 1984).

24. *Id.* at 713.

25. 468 N.Y.S.2d 341 (N.Y. App. Div. 1983).

26. *Id.* at 341.

determined that the insured's conduct constituted a breach of the insurance policy.²⁷ The court, citing the decision in *Pogo Holding Corp.*, explained that insurance companies are entitled to obtain relevant information "promptly and while the information is still fresh," to enable them to decide upon their obligations and protect against false claims.²⁸ The court upheld summary judgment in favor of the insurer, refusing to give the insured another chance to comply with the policy requirements and reasoning that an insured cannot, three and one-half years after the claimed loss, agree to provide previously requested information, because to permit the insured to do so would constitute a material dilution of the insurer's rights.²⁹ The *Williams* court further held that an insured's "willful refusal to answer relevant questions" during his examination under oath constituted a breach of a substantial condition of the insurance policy.³⁰

C. Bar if Failure to Comply is Willful

More recent New York cases, however, seem to require that the insured's failure to submit to an examination under oath be either willful or part of a "pattern of refusal or persistent noncooperation" before the breach of the condition precedent constitutes an absolute bar to suit without further opportunity to cure the breach.³¹ In *Zizzo v. Liberty Mutual Insurance Co.*,³² the court, relying upon *James & Charles Dimino Wholesale Seafood v. Royal Insurance Co.*,³³ explained that to prevail upon its defense of noncompliance with the cooperation clause, the insurer was required to establish that the insured "engaged in a pattern of willful non-cooperation with [its] requests for information without explanation or excuse."³⁴ Thus, when the insured submitted to an examination under oath but refused to submit certain documents, including telephone records and income tax returns, which she felt were irrelevant to her claim, but then offered to

27. *Id.*

28. *Id.*

29. *Id.*; see also *Lindsey v. State Farm Fire & Cas. Co.*, 10 Fed. App'x 231 (4th Cir. 2001) (holding that failure to complete interrupted examination under oath for one and one-half years constitutes substantial failure to comply with the insurance policy and entitles the insurer to summary judgment).

30. *Williams*, 460 N.Y.S.2d at 341 (citing *Hallas v. N. River Ins. Co. of N.Y.*, 107 N.Y.S.2d 359, 360 (N.Y. App. Div. 1951); *Dyno-Bite, Inc. v. Travelers Cos.*, 439 N.Y.S.2d 558, 560 (N.Y. App. Div. 1981)); *Vogias v. Ohio Farmers Ins. Co.*, 177 Ohio App. 3d 391, 2008-Ohio-3605, 894 N.E.2d 1265, at ¶ 35 (failure to complete examination requires dismissal of lawsuit).

31. See *In re Ins. Co. of Pa. v. Lubo*, 729 N.Y.S.2d 829, 829 (N.Y. Sup. Ct. 2001). See also *Delaine v. Finger Lakes Fire & Cas. Co.*, 806 N.Y.S.2d 320, 322 (N.Y. App. Div. 2005) (insureds' conduct did not constitute "willful and avowed obstruction"); *Bhattacharyya v. Quincy Mut. Fire Ins. Co.*, 799 N.Y.S.2d 158 (N.Y. Sup. Ct. 2004).

32. 728 N.Y.S.2d 343 (N.Y. App. Term 2001).

33. 656 N.Y.S.2d 325 (N.Y. App. Div. 1997).

34. *Zizzo*, 728 N.Y.S.2d at 344.

provide those documents when she learned of their relevance, the court held that the issue of cooperation was a triable issue of fact for the jury.³⁵

Several jurisdictions recognized that if an insured's refusal to submit to an examination under oath or provide documents is either willful or part of a deliberate effort to withhold material information, the willful breach of the condition precedent in the policy constitutes an absolute bar to suit. In *Allen v. Michigan Basic Property Insurance Co.*,³⁶ the Court of Appeals of Michigan held that an insured's failure to provide documents requested by the insurer during its investigation of her claim and the insured's refusal to submit to an examination under oath constituted part of a deliberate effort to withhold material information or a pattern of noncooperation with the insurer, and such behavior required dismissal of her claims with prejudice.³⁷ In an unpublished decision, the Massachusetts Court of Appeals held that an insured claiming personal injury protection benefits under a policy of insurance was barred from recovery when the insured's refusal to attend an examination under oath was both "wilful and unexcused, and therefore a breach of the contract."³⁸ Moreover, the court agreed with the lower court's determination that the insurer was not required to demonstrate that it was prejudiced by the insured's failure to submit to an examination under oath.³⁹

In *Hanover Insurance Co. v. Cape Cod Custom Home Theater, Inc.*,⁴⁰ the court, while noting a general rule that an insurer may not disclaim coverage by virtue of an insured's breach of its duty to cooperate absent a showing of prejudice, noted a limited exception to that rule when the insured's refusal to submit to an examination under oath is willful and unexcused.⁴¹ The court carved out this "exception" to the rule because of the significance of the examination under oath in "weeding out fraud."⁴² The court further held that an insured could not "cure" such a breach.⁴³ In another unpublished decision, the Superior Court of Connecticut noted that an insured's failure to produce requested documents must have been willful, since he acknowledged in his examination under oath that the income tax returns were filed and, in the absence of any explanation, "it is difficult to conceive how such a breach is not wilful."⁴⁴

35. *Id.*

36. 640 N.W.2d 903 (Mich. Ct. App. 2001).

37. *Id.* at 908.

38. *Fox v. Rivera*, No. 02-P-732, 2004 WL 1878260, at *3 (Mass. App. Ct. Aug. 23, 2004).

39. *Id.*

40. 891 N.E.2d 703 (Mass. App. Ct. 2008).

41. *Id.* at 707.

42. *Id.*

43. *Id.*

44. *Double G.G. Leasing, LLC v. Underwriters at Lloyds, London*, No. AANCV075003003, 2008 WL 2345205, at *20 (Conn. Super. Ct. May 16, 2008).

The New York Supreme Court, Appellate Division, examined the insureds' refusal to submit to examinations under oath unless they could be present for each other's examinations.⁴⁵ The court held that the insureds had no right to be present at each other's examination, but nevertheless concluded that the insurer had failed to sustain "its heavy burden of demonstrating that the plaintiffs engaged in a pattern of unreasonable and willful noncooperation so as to warrant denial of the claim."⁴⁶ Thus, the court acknowledged that insureds could not engage in a pattern of unreasonable and willful "noncooperation" as a complete bar to suit, but applied a "heavy burden" on the insured to establish such improper conduct.⁴⁷ The decision arguably creates dangerous precedent. An insured could simply find some issue of first impression as an excuse for failing to submit to an examination under oath and substantially frustrate the insurer's investigation through the resulting delay.

D. Bar Only if Prejudice

A number of courts require that an insurer demonstrate that it was prejudiced by an insured's failure to comply with policy provisions to prevail on such a defense. In *Evans v. Norfolk & Dedham Mutual Life Insurance Co.*,⁴⁸ the court, citing *Darcy v. Hartford Insurance Co.*,⁴⁹ held that an insurer seeking to disclaim liability on the grounds of an insured's breach of a cooperation provision in the policy must affirmatively demonstrate that actual prejudice resulted from the breach.⁵⁰ The court noted that there was no evidence of actual prejudice shown by the insurer by reason of the insured's failure to submit to an oral examination "on oath" as requested by the insurer and that the absence of prejudice precluded summary judgment on behalf of the insurer.⁵¹ Similarly, in *Puckett v. State Farm General Insurance Co.*,⁵² the court held that an insured was not required, as a condition precedent to bringing suit, to submit to an examination under oath, but an insured's failure to cooperate might bar recovery if the insurer could show prejudice.⁵³

45. See *Park v. Long Island Ins. Co.*, 787 N.Y.S.2d 98 (N.Y. App. Div. 2004).

46. *Id.* at 99 (citing *Laiosia v. Republic Ins. Co.*, 630 N.Y.S.2d 238 (N.Y. App. Div. 1995); *Allstate Ins. Co. v. Durand*, 729 N.Y.S.2d 192 (N.Y. App. Div. 2001)).

47. *Id.*

48. 1992 Mass. App. Div. 38 (Mass. Dist. Ct. 1992).

49. 554 N.E.2d 28, 32-34 (Mass. 1990).

50. *Evans*, 1992 Mass. App. Div. at 38.

51. *Id.*

52. 444 S.E.2d 523 (S.C. 1994).

53. *Id.* at 524.

In *Koclanakis v. Merrimak Mutual Fire Insurance Co.*,⁵⁴ the court declined to grant summary judgment based on the insured's failure to provide a proof of loss or submit to an examination under oath, as required by the policy, but simply ordered the insured to comply with the policy provisions.⁵⁵ The court held that the insurer could renew its request for summary judgment if it could establish that it had been prejudiced by the delay in the insured's compliance.⁵⁶

In *C-Suzanne Beauty Salon, Ltd. v. General Insurance Co.*,⁵⁷ the insureds declined the insurer's "request" for an examination under oath on the basis that it would be a waste of time to conduct the examination since the insureds had decided "not to press their claim."⁵⁸ When the insureds changed their mind and filed suit shortly before the limitations period for their claim expired, the insurer filed a motion to dismiss for the insured's failure to appear for an examination under oath.⁵⁹ The Second Circuit agreed with the district court's decision to deny a motion to dismiss absent a showing of prejudice for the insured's failure to submit to an examination under oath, reasoning that the fact that the insureds changed their minds and decided to sue, rather than declining to present their claim, could not justify a conclusion that, "as a matter of law, they willfully refused to be examined."⁶⁰ Thus, the court's decision seems to be in accord with the approach that absent a willful refusal to submit to an examination under oath, the insurer must establish prejudice to bar the insured's claim.

III. TRADITIONAL CONTRACT PRINCIPLES

A. Application of Traditional Contract Principles

In many jurisdictions, the courts have applied the same rules of construction to insurance contracts as in any other type of contract. In *Waste Management, Inc. v. International Surplus Lines Ins. Co.*,⁶¹ the court noted that "the very principles of law which govern contracts generally apply with equal force to contracts of insurance."⁶² Similarly, in

54. 709 F. Supp. 801 (N.D. Ill. 1988).

55. *Id.* at 807.

56. *Id.*

57. 574 F.2d 106 (2d Cir. 1978).

58. *Id.* at 111.

59. *Id.* at 108-09.

60. *Id.* at 111. *See also* *Hartshorn v. State Farm Ins. Co.*, 838 N.E.2d 211, 215 (Ill. App. Ct. 2005).

61. 579 N.E.2d 322 (Ill. 1991).

62. *Id.* at 327.

Metropolitan Life Insurance Co. v. Alterovitz,⁶³ the court noted: “[A]n insurance contract is controlled by the same law as any other contract.”⁶⁴

Some courts, at least in the context of insurance policies providing liability coverage, impose requirements on insurers that are not derived from traditional principles of contract construction. In *M.F.A. Mutual Insurance Co. v. Cheek*,⁶⁵ the court required an insurer to demonstrate that it suffered prejudice in its ability to defend an action against its insured when the insured failed to cooperate in the defense of the personal injury suit against him.⁶⁶ The court reasoned:

[I]nsurance policies, in fact, are simply unlike traditional contracts, I.e., [sic] 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.⁶⁷

Thus, with respect to an insurance policy providing liability coverage, the Illinois Supreme Court, following a California decision, required the insurer to prove substantial prejudice to demonstrate that it was actually hampered in its defense of the insured in the personal injury action to avoid coverage.⁶⁸ The court rejected the notion that the insurer should enjoy a “presumption of prejudice when the insurer attempts to avoid responsibility for a breach of the cooperation clause.”⁶⁹

The considerations of the impact that voiding policy coverage might have in liability policies on innocent third parties do not exist in policies providing property coverage. For example, in a fire policy, typically no other victim exists other than the insured, and, if the insured procured the loss, she is not a “victim” at all. Quite the contrary, the real victims of arson are the policyholders who pay increased premiums based on the intentional wrongdoing of the arsonist. Thus, in the context of insurance policies providing coverage for damage to an insured’s property, no public policy considerations relating to innocent third parties exist that would require an exception to applying the traditional rules of contract construction. Accordingly, the exception to the general rule that an

63. 14 N.E.2d 570 (Ind. 1938).

64. *Id.* at 577. *See also* *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 579 N.E.2d 322, 327 (Ill. 1991) (stating that “the very principles of law which govern contracts generally apply with equal force to contracts of insurance” (citing *Zitnik v. Burik*, 69 N.E.2d 888, 890 (Ill. 1946))).

65. 363 N.E.2d 809 (Ill. 1977).

66. *Id.* at 813.

67. *Id.*

68. *Id.*

69. *Id.* (citing *Campbell v. Allstate Ins. Co.*, 384 P.2d 155, 157 (Cal. 1963)).

insurance contract should be interpreted as any other contract should be followed unless a significant public policy consideration requires otherwise.

B. Traditional Liability for Breach of Contract

The courts have not required breaches of contract to be “intentional” to rise to an actionable breach of contract. To the contrary, a party is liable for breach of contract even if it was “not responsible” for the breach.⁷⁰ Thus, when a contracting party is unable to perform through no fault of its own, the party is nevertheless liable for breach of contract.⁷¹ In a case in which the party required to supply gasoline could not do so because the gasoline was contaminated by water through no fault of the party, the Seventh Circuit Court of Appeals explained: “The fact that [the plaintiff] was not responsible for the water in the gasoline is of no significance. Liability for breach of contract is normally and here strict liability.”⁷²

Under the common law, no scienter is required:

Fault is irrelevant to breach of contract. Whether one intentionally, carelessly, or innocently breaches a contract, he is still considered in breach of that contract, and will be liable to the extent that the other party must be placed in the position he would have been in absent the breach.⁷³

Some courts, however, will consider the “willfulness” of the breaching party: “While the willfulness of a breach of contract may not enhance the injury, it does so far increase the demerit of the wrongdoer that the law is less inclined, if a breach is willful, to require the injured party to perform.”⁷⁴

70. *Chronister Oil Co. v. Unocal Refining and Marketing*, 34 F.3d 462, 464 (7th Cir. 1994).

71. *See id.*

72. *Id.*; accord 12A ILLINOIS LAW AND PRACTICE, CONTRACTS § 289 (2012) (“Whether one intentionally, carelessly, or innocently breaches a contract, such person is still considered to be in breach of that contract, and the extent of his or her liability is generally the same.” (citing *William Zeigler & Son v. Chi. N.W. Dev. Co.*, 389 N.E.2d 195 (Ill. App. Ct. 1979); *Kalal v. Goldblatt Bros., Inc.*, 368 N.E.2d 671 (Ill. App. Ct. 1977); *Loss v. Danter Assocs., Inc.*, 242 N.E.2d 330 (Ill. App. Ct. 1968))).

73. *Wait v. First Midwest Bank/Danville*, 491 N.E.2d 795, 802 (Ill. App. Ct. 1986) (citing *Album Graphics, Inc., v. Beatrice Foods Co.*, 408 N.E.2d 1041, 1050 (Ill. App. Ct. 1980)).

74. 12A ILLINOIS LAW AND PRACTICE, CONTRACTS § 289 (2012) (citing *Leazzo v. Dunham*, 420 N.E.2d 851, 854 (Ill. App. Ct. 1981)).

C. Definition of Material Breach

Under “traditional” contract law,

Whether a breach is material involves a determination of “whether the breach worked to defeat the bargained-for objective of the parties or caused disproportionate prejudice to the non-breaching party, whether custom and usage consider such a breach to be material, and whether the allowance of reciprocal non-performance by the nonbreaching party will result in his accrual of an unreasonable or unfair advantage.”⁷⁵

In property insurance, the “bargained-for objective” with respect to claims handling is the ability of an insurer to obtain sufficient information from its insured (frequently the best, and sometimes the only, source of information concerning a claim) so that it can decide upon its rights and obligations after being fully informed of the facts of the claim. The policy requirements that an insured produce documents and submit to examinations under oath, as the courts have repeatedly recognized, provides the insurer a mechanism in which to collect sufficient information to decide its rights and obligations without the attendant costs and delays of litigation. The mechanism also provides an invaluable tool for “weeding out fraud” and therefore, protecting innocent policyholders who necessarily must bear the costs of insurance fraud through increased premiums. Depriving the insurer of its ability to utilize these mechanisms before suit is filed, and requiring the insurer to delay obtaining information until after motions attacking the substance of the pleadings, jurisdiction, and venue are resolved, and paper discovery is exchanged, necessarily gives the insured an unreasonable and unfair advantage over the insurer. The insured can typically require production of the insurer’s investigation file and conform his testimony to the evidence he now knows the insurer has gathered. Likewise, the insured will be able to take advantage of fading memories of witnesses and the inability to obtain documents such as cellular telephone records, text messages, and other electronic information that is kept for limited periods of time.

75. *Virendra S. Bisla, M.D., Ltd. v. Parvaiz*, 884 N.E.2d 790, 795 (Ill. App. Ct. 2008) (quoting *William Blair & Co. v. FI Liquidation Corp.*, 830 N.E.2d 760, 779 (Ill. App. Ct. 2005)).

IV. HARMONIZING THE DISPARATE APPROACHES THROUGH TRADITIONAL PRINCIPLES

A. Abeyance

A rule that simply allows an insured to avoid cooperating with the insurer's investigation by refusing to produce documents, submit to an examination under oath, or otherwise provide requested information until the insured decides to move forward with a suit serves no other purpose than to encourage delay, deter amicable resolution of the claim, and protect fraudulent claimants. The courts have recognized that an insurer has a right to prompt compliance with the requirement to submit to an examination under oath when the evidence is fresh.⁷⁶ In *Argento*, the New York Appellate Division cogently and succinctly explained:

An insurance company is entitled to obtain information promptly while the information is still fresh to enable it to decide upon its obligations and protect against false claims. To permit the plaintiff to give the information more than three years after the fire would have been a material dilution of the insurance company's rights.⁷⁷

An insured who is attempting to conceal information from the insurer has every incentive to delay cooperation in a jurisdiction that imposes no consequence for such delay other than holding the insured's lawsuit in abeyance until the insured complies with the insurer's requests. An insured may simply wait until the policy or statute of limitation period is about to expire before filing suit and then take advantage of the inherent delays of the court system until the evidence becomes so stale and the witnesses' memories so faded that the insurer's ability to determine the facts and circumstances of the claim will be substantially eroded.

Nothing in traditional contract principles protects a contracting party from the consequences of failing to abide by the terms of a contract. The abeyance approach cannot be harmonized with traditional contract principles or public policy and should be rejected.

B. Absolute Bar

The courts that hold the failure to comply with conditions precedent relating to insurance investigations as a bar to recovery under the policy

76. *Argento v. Aetna Cas. & Sur. Co.*, 584 N.Y.S.2d 607, 607-08 (N.Y. App. Div. 1992); *Evans v. Int'l Ins. Co.*, 562 N.Y.S.2d 692, 694 (N.Y. App. Div. 1990); *Williams v. Am. Home Assurance Co.*, 468 N.Y.S.2d 341, 343 (N.Y. App. Div. 1983), *aff'd*, 468 N.E.2d 54 (N.Y. 1984).

77. *Argento*, 584 N.Y.S.2d at 608.

may be viewed as simply applying basic contract law. Since no scienter is required to hold a breaching party responsible for its breach under traditional contract law, an insurer should, absent rare circumstances requiring a deviation from traditional contract principles, preclude the insured from recovery following that insured's breach. In insurance policies providing coverage to the insured's property, no reason exists to deviate from traditional contract principles when an insured fails to give statements, produce documents, or submit to examinations under oath.

Of the possible reasons for failing to comply with policy provisions relating to the investigation concerning the cause, nature, and extent of a loss, it is difficult to conceive of a legitimate reason for failing to comply. For example, the courts have almost uniformly held that an insured's fear that complying with policy provisions of producing documents and submitting to examinations under oath might be used by a prosecuting body in a collateral criminal prosecution arising out of the same loss does not excuse the obligation to perform those duties.⁷⁸

An insured's claim that an insurer's investigation is an inconvenience to the insured or creates an undue burden upon the insured cannot constitute a legitimate excuse, as such an excuse would eviscerate the policy provision. In any event, the U.S. Supreme Court specifically noted in *Clafin v. Commonwealth Ins. Co.*,⁷⁹ that despite the potential inconvenience to insureds, requiring insureds to submit to examinations under oath was necessary to help insurers detect fraud.⁸⁰ As a practical matter, a typical investigation would only require the insured to give a recorded statement to the insurer's line unit, a more extensive statement to a special investigator, and submit to an examination under oath. Additionally, the insured would be required to collect documents and produce them to the insurer, but frequently those documents would be in the hands of third parties, such as accountants, tax preparers, banks, cellular telephone service providers, and credit card companies, and can be ordered through a simple telephone call. The "inconvenience" to the insured cannot provide a legitimate reason to avoid the effect of a breach of the duty to produce documents and submit to an examination.

C. Willful Refusal

Precluding an insured from recovering under an insurance policy when the insured willfully or intentionally breaches her obligations to submit to examinations and produce documents is consistent with the

78. *See* Am. Country Ins. Co. v. Bruhn, 682 N.E.2d 366, 371 (Ill. App. Ct. 1997); *see also* cases collected in JAMES E. DEFRANCO, EXAMINATIONS UNDER OATH 102-121 (2002).

79. 110 U.S. 81 (1884).

80. *Id.* at 95-97.

notion that the “demerit” of the insured is such that the insurer should not be required to perform under the contract. In the context of claims for damaged or stolen property, an insured’s compelling reason to willfully breach her obligations is to prevent the discovery of information that would demonstrate that the loss is not covered under the policy. Thus, the insured’s failure to comply deprives the insurer of the benefit of the bargain, which would certainly include the agreement that only legitimate claims are covered under the policy.

In *Prince v. Farmers Insurance Co.*,⁸¹ the court held that the insured’s failure to submit to an examination under oath and comply with the terms of the fire insurance policy was willful and therefore resulted in a forfeiture under the policy regardless of whether the insurer was prejudiced.⁸² In *Prince*, the insured, through her counsel, stated in a letter that she absolutely refused to give a sworn statement even though she was aware that the result would be a forfeiture under the policy.⁸³ Interestingly, the court, in rejecting the insured’s argument that she felt intimidated by the insurer’s counsel, reasoned that the insured’s subjective feeling did not in any way relieve her of her duty to submit to an examination under oath pursuant to the insurance contract.⁸⁴

Similarly, an insured’s claimed confusion or misunderstanding of his obligations under a contract is not a defense in any other area of contract law and should not relieve an insured of his duties under the policy.⁸⁵ The insured could always request a copy of the insurance policy, and insurers frequently cite the policy provisions upon which they are relying in the correspondence demanding that the insured submit to an examination under oath or produce documents.

Several courts have held that an insured’s refusal to give an examination under oath bars recovery, regardless of whether the insurer suffered any prejudice as a result of the insured’s failure to do so. In *Fox v. Rivera*,⁸⁶ the superior court of Massachusetts held that submission to an examination under oath was a condition precedent to recovery of personal injury protection benefits under an insurance policy and that the insured’s failure to submit to such an examination constituted a material breach of the insurance contract.⁸⁷ The court held that the insurer need not prove actual

81. 790 F. Supp. 263 (W.D. Okla. 1992).

82. *Id.* at 267.

83. *Id.*

84. *Id.* (citing *Conn. Fire Ins. Co. v. George*, 153 P. 116 (Okla. 1915)).

85. See *Camp Kennybrook Inc. v. Kuller*, 632 N.Y.S.2d 874 (N.Y. App. Div. 1995); *Harrigan v. Turner*, 53 Ill. App. 292 (1893).

86. No. 011820, 2001 WL 1771984 (Mass. Super. Ct. Nov. 26, 2001).

87. See *id.* at *2.

prejudice to justify its refusal to provide such benefits under the policy and granted the insurer's motion for summary judgment.⁸⁸

D. Prejudice Requirement

An examination of the requirement that an insurer show prejudice to sustain a claim denial based on a failure to cooperate indicates that the concept may have begun with liability policies and an insured's failure to give timely notice of a claim. In *Piser v. State Farm Mutual Automobile Insurance Co.*,⁸⁹ the court asserted:

Nonetheless, it is well settled that "unless the alleged breach of the cooperation clause substantially prejudices the insurer in defending the primary action, it is not a defense under the contract. This is the test to be employed in our courts in cases where the issue is a breach of the cooperation clause."⁹⁰

The *Piser* court cited two cases to support the conclusion that the property insurer must demonstrate prejudice, *M.F.A. Mutual Insurance Co. v. Cheek*⁹¹ and *State Farm Mutual Automobile Insurance Co. v. McSpadden*,⁹² both of which related to third party automobile liability cases, not first party claims of the insured for benefits due to property loss.⁹³

The duty of an insured to cooperate with his insurer when sued for personal injuries is readily distinguishable from the duty of an insured submitting a claim for loss to the insured's property. The Indiana Court of Appeals reasoned:

The Indiana Supreme Court noted that these provisions were not "cooperation clauses," which require the insured to assist the insurer in

88. *Id.* at *3.

89. 938 N.E.2d 640 (Ill. App. Ct. 2010).

90. *Id.* at 648.

91. 363 N.E.2d 809 (Ill. 1977).

92. 411 N.E.2d 121 (Ill. App. Ct. 1980).

93. *Piser*, 938 N.E.2d at 648. *See also* Talley v. State Farm Fire & Cas. Co., 223 F.3d 323 (6th Cir. 2000) (requiring a showing of prejudice by an insurer in a first party fire loss case based on Tennessee Supreme Court holding in *Alcazar v. Hayes*, 982 S.W.2d 845 (Tenn. 1998), which held that prejudice was required for uninsured motorist policy to be forfeited when the insured does not comply with the notice provision of the insurance policy). In *Brizuela v. Calfarm Insurance Co.*, 10 Cal. Rptr. 3d 661, 671 (Cal. Ct. App. 2004), the court noted, "There is a distinction, however, between a breach of a duty of cooperation and a breach of the duty to submit to an examination under oath." The court noted that the lack of cooperation can be ascribed to many acts or omissions, and that not every failure of an insured to cooperate should result in a forfeiture of the policy. *Id.* An insured's failure to submit to an examination under oath, however, does not involve subjective evaluations that a breach of a cooperation clause presents, only whether the insured submitted or did not submit to the examination. *Id.*

investigating and defending a claim. Rather, the provision is “an entirely separate condition that explicitly requires the policy holder to perform specific duties [such as produce records and submit to an examination under oath].” “While disputes regarding alleged breaches of an insured’s duty under a separate ‘cooperation clause’ may necessitate consideration of resulting prejudice to the insurance company, such prejudice is not a necessary consideration in determining the enforceability of other insurance policy provisions.”⁹⁴

The court specifically held that compliance with the request for the examination under oath “was not optional.”⁹⁵ In *Morris*, the Supreme Court of Indiana distinguished the types of “cooperation clauses” contained in the insuring agreements relating to liability insurance from property coverage.⁹⁶ The Supreme Court of Indiana rejected arguments that the insured could refuse to submit to examinations under oath until they were given copies of their previous statements or refuse to provide requested documents until they obtained a court ruling on whether the requested documentation was reasonable, stating: “[T]he Morris’ submission to examination under oath and disclosure of documents as required by [the insurer] was a contractual obligation, not a discovery request under the Trial Rules. Compliance was not optional or subject to a trial court determination of reasonableness.”⁹⁷

The Supreme Court of New Hampshire also rejected requiring an insurer to demonstrate prejudice in a property claim by analogizing that type of breach to breaches of cooperation clauses in policies providing liability coverage.⁹⁸ The court noted that the effect of an insured’s breach of a provision requiring him to submit to an examination under oath differed from the failure to provide timely notice to report a potential claim in a liability policy.⁹⁹ The court reasoned:

A delay in receiving notice does not necessarily impair the insurer’s ability to investigate the claim. In contrast, an insured’s refusal to submit to an [examination under oath] significantly affects the insurer’s investigation of the claim. Here, Progressive requested the [examination

94. *Knowledge A-Z, Inc. v. Sentry Ins.*, 857 N.E.2d 411, 420 (Ind. Ct. App. 2006) (citations omitted) (quoting *Morris v. Economy Fire & Casualty Co.*, 848 N.E.2d 663, 666 (Ind. 2006)). The Seventh Circuit Court of Appeals, following *Morris*, concluded that the “duties after loss” clause requiring an insured to submit to an examination under oath and produce documents was “not a cooperation clause that requires only reasonable assistance with the investigation of the claim, but [was] ‘an entirely separate condition that explicitly requires the policyholder to perform specific duties.’” *Foster v. State Farm Fire & Cas. Co.*, 674 F.3d 663, 667 (7th Cir. 2012) (emphasis in original) (quoting *Morris*, 848 N.E.2d at 666).

95. *Knowledge A-Z, Inc.*, 857 N.E.2d at 420.

96. *Morris*, 848 N.E.2d at 667.

97. *Id.*

98. *Krigsman v. Progressive N. Ins. Co.*, 864 A.2d 330, 335 (N.H. 2005).

99. *Id.*

under oath] in order to resolve the residency issue and make a coverage determination. We will not require Progressive to prove that it has been prejudiced by the petitioner's refusal to submit to the [examination under oath].¹⁰⁰

The court reasoned that the examination under oath provided a mechanism for the insurer to corroborate the claim by obtaining information that is primarily or exclusively within the possession of the insured and, following the Massachusetts Court of Appeals,¹⁰¹ reasoned that the purpose of an examination under oath is to enable the carrier "to possess itself of all knowledge, and all information as other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims."¹⁰²

Requiring an insurer to demonstrate prejudice before absolving itself of liability, or indemnification of the insured for the insured's negligence or fault, in third party liability claims presumably does not relate to the issue of insurance fraud, and the cooperation of the insured charged with fault or negligence is not necessarily required for the insurer to determine its rights and obligations under the policy of insurance. In liability claims, an insurer might be able to utilize police reports, statements of witnesses to accidents, reports of experts, and other information from third parties to determine its rights and obligations to the insured claimant. Moreover, in such third-party liability claims, the courts are also concerned with the effect a denial of liability may have on the injured and presumably innocent third party (i.e., the person seeking damages as a result of the insured's alleged negligence). In first party property insurance cases, however, the only party other than the insured whose rights might be affected by a denial due to noncooperation would be a lien holder identified in the policy as the loss payee or mortgagee, but typically the lien holder's rights are protected such that it would not be affected by a denial based on the insured's failure to cooperate.

Placing a requirement on an insurer that it demonstrate the manner in which it was prejudiced by an insured's failure to submit to an examination under oath or produce documents in a first party property claim in which fraud is suspected is a rather curious requirement. The mere existence of the requirement would encourage insureds guilty of fraud to refuse to comply in hopes that the insurer will not be able to demonstrate to the court's satisfaction that it was prejudiced. The requirement also ignores one of the purposes behind the cooperation clauses: to enable the insurer to

100. *Id.*

101. *Id.* at 334 (citing *Lorenzo-Martinez v. Safety Ins. Co.*, 790 N.E.2d 629, 295-96 (Mass. App. Ct. 2003)).

102. *Id.* (quoting *Clafin v. Commonwealth Ins. Co.*, 110 U.S. 81, 94-95 (1884)).

determine its rights and obligations without having to engage in contentious and adversarial litigation with its attendant costs.¹⁰³

If an insurer is entitled to gather information when the evidence is still “fresh,” then the insured’s failure to submit to an examination under oath, provide documents, or otherwise cooperate with the insurer until a court orders compliance with the policy conditions guarantees that the insurer will be prejudiced, because the insured’s delay in cooperating prevents the insurer from obtaining evidence while it is “fresh.” The prejudice to the insurer is compounded by the fact that an insured’s delay deprives the insurer of the ability to follow up on evidence it could have obtained, through an insured’s production of documents or submission to an examination under oath, by seeking statements and information from other witnesses whose memories may fade or documents that may not be preserved. As time passes from the claimed loss, evidence goes stale and memories fade, exacerbating this prejudice.

In *Tran v. Commerce Insurance Co.*,¹⁰⁴ the court rejected the insureds’ argument that the insurer was not entitled to summary judgment based on their failure to appear for examinations under oath because the insurer did not demonstrate actual prejudice.¹⁰⁵ The court reasoned that: “To require [the insurer] to decide whether or not to pay, without giving it the opportunity to resolve its reasonable concerns as to its obligation to pay, is to prejudice [the insurer].”¹⁰⁶ The court held that, in any event, the failure to submit to an examination under oath was a breach of a condition precedent to recovery under the policy and that a “condition precedent is not rendered nugatory merely because the beneficiary of the condition is not harmed by non-performance of the condition.”¹⁰⁷

Since the insured typically has exclusive knowledge, or at least the most knowledge, of the circumstances and extent of the loss in a property claim, the insured would also have exclusive, or the most, knowledge of the facts that would determine whether the loss was covered and the extent of the loss. Requiring the insurer, who cannot access the information due to the failure of the insured to comply with the conditions precedent, makes little sense and disadvantages the insurer.

If, in very limited circumstances, a court believes that it is clear that the insured has not willfully failed to appear for an examination and the circumstances are such that it is not clear that the breach is material or

103. See DEFRANCO, *supra* note 78, at 14-15.

104. No. CIV. A. 01-0129, 2001 WL 1517580 (Mass. Super. Nov. 21, 2001).

105. *Id.* at *5.

106. *Id.*

107. *Id.*

deprives the insured of the benefit of its bargain, the court should require the insured to demonstrate that the insurer was not prejudiced by her breach.

In *Talley v. State Farm Fire & Casualty Co.*,¹⁰⁸ the Sixth Circuit created a presumption that an insured's failure to give an examination under oath prejudices the insurer, which the insured may then rebut.¹⁰⁹ After the insured in that case refused to give an examination under oath related to his fire loss claim due to concern over an ongoing criminal investigation into the fire and the insurer subsequently denied the claim, the district court entered judgment as a matter of law in favor of the insurer.¹¹⁰ The court entered the judgment on the basis that the insured's breach of the cooperation clause, by refusing to submit to an examination under oath, constituted an automatic forfeiture of the policy.¹¹¹ Although the insured claimed that the insurer was not entitled to judgment because it had not shown that it was prejudiced by the insured's lack of cooperation, the district court explained, "I don't find that under the prevailing law or under the statute there has to be a showing of prejudice or reasonableness."¹¹²

On appeal, the Sixth Circuit explained that the intervening Tennessee Supreme Court decision in *Alcazar v. Hayes*,¹¹³ which was decided after the district court in *Talley* granted judgment in favor of the insurer, changed the law in Tennessee and required an insurer to show prejudice before it could escape liability under a policy for an insured's breach of a cooperation clause.¹¹⁴ The Sixth Circuit recognized that the *Alcazar* decision did "not specifically apply to the fire insurance policy context," but nevertheless concluded that the "weight of Tennessee law seems to indicate a clear trend towards a showing of prejudice," and the court required such a showing for forfeiture of the fire insurance policy at issue.¹¹⁵

The Sixth Circuit, however, further held that the insured's failure to submit to an examination under oath created a rebuttable presumption that the insurer was "prejudiced by the delay."¹¹⁶ The *Talley* decision struck a delicate compromise between protecting the recovery of a potentially innocent, albeit noncompliant, insured and protecting the insurer from the abuse of fraudulent insureds who purposefully impede and delay an

108. 223 F.3d 323 (6th Cir. 2000).

109. *Id.* at 328.

110. *Id.* at 324.

111. *Id.*

112. *Id.* at 326.

113. 982 S.W.2d 845 (Tenn. 1998).

114. *Talley*, 223 F.3d at 327 (citing *Alcazar*, 982 S.W.2d 845). The Sixth Circuit reaffirmed its position in *Lester v. Allstate Property & Casualty Insurance Co.*, 743 F.3d 469, 471 (6th Cir. 2014).

115. *Talley*, 223 F.3d at 327-28.

116. *Id.* at 328.

insurer's investigation without consequence. By finding that an insured's lack of cooperation creates a rebuttable presumption that the insurer was prejudiced, the court removed the burden from the insurer of satisfying this extra contractual requirement, at least until the insured adduced some evidence that the insurer was not prejudiced.¹¹⁷

The problem with the Sixth Circuit's approach, however, is that permitting the insured to present evidence to "rebut" the presumption of prejudice provides the insured an opportunity to frustrate the investigation of a questionable claim in hopes that a creative lawyer will be able to convince the judge that the failures to comply with duties under the policy somehow did not prejudice the insurer. As the courts have noted, delay inevitably produces prejudice. Thus, permitting an insured to avoid its duties under a contract of property insurance should only be allowed in limited circumstances.¹¹⁸

V. CONCLUSION

The courts should apply traditional rules of contract interpretation when determining the effect of a breach of insurance policy provisions requiring production of documents or submission to examinations under oath, unless some compelling public policy consideration requires otherwise. An insured breaching such provisions should be precluded from recovering under the policy absent extraordinary circumstances. Engrafting requirements that an insurer demonstrate a pattern of willful breaches or prejudice when an insured breaches its obligation serves little purpose other than encouraging insurance fraud and increasing the costs of property insurance to the general public.

117. In *Brizuela v. Calfarm Insurance Co.*, 10 Cal. Rptr. 3d 661, 671 (Cal. Ct. App. 2004), the court reasoned that an insured's failure to comply with a policy requirement that the insured submit to an examination under oath "deprives the insurer of a means for obtaining information necessary to process the claim. The inability to obtain such information is prejudicial, absent extraordinary circumstances."

118. The *Brizuela* court recognized that extraordinary circumstances might exist in which the insurer would not be prejudiced by an insured's failure to submit, but did not provide any examples. *Id.* at 670-71. An extraordinary situation would include one in which the delay in submitting to an examination was unintentional, did not delay the examination to the extent that the insurer was unable to obtain evidence when it was fresh, and did not preclude the insurer from deciding upon its rights and obligations without litigation.