THE DUTIES OF THE INSURED:
IT’S NOT A ONE-WAY STREET!

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State Bar of Texas
3RD ANNUAL ADVANCED
INSURANCE LAW COURSE
March 30-31, 2006
Dallas

CHAPTER 11
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I. INTRODUCTION

Any reference to the concept of “duty” in the insurance law context automatically evokes thoughts of the insurer’s duties under the insurance policy, both contractual and extra-contractual. In fact, it is probably the extra-contractual duties, and the liability that potentially can result from an insurer’s breach of those duties, that conditions us to think this way. Policyholders and their lawyers are quick to remind insurers of their duties, and liability for breach of those duties, when disputes arise concerning the handling of a claim or suit, or interpretation of an insurance provision. However, it is not a one-way street in the relationship between insurer and insured. Like other contracts, insurance policies impose duties and obligations on both parties to the agreement. This article will discuss the insured’s post-loss duties and responsibilities under liability insurance policies, and the consequences of the insured’s breach of those duties.

II. NOTICE AND TENDER TO THE INSURER

A. Contractual Provisions

A typical liability insurance policy will include the following or similar language in the “conditions” section of the policy:

2. Duties In The Event of Occurrence, Offense, Claim or Suit
   a. You must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim….
   b. If a claim or “suit” is brought against any insured, you must:
      (1) Immediately record the specifics of the claim or suit” and the date received; and
      (2) Notify us as soon as practicable.

   You must see to it that we receive written notice of the claim or “suit” as soon as practicable.
   c. You and any other involved insured must:
      (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or “suit”….

   COMMERCIAL GENERAL LIABILITY COVERAGE FORM

   Texas courts and federal courts construing Texas law have construed this language to mean that an insured has a duty to notify the insurer of suit and tender to the insurer a petition or complaint alleging a potentially covered claim in order to trigger the insurer’s duty to defend. Members Ins. Co. v. Branscum, 803 S.W.2d 462, 467 (Tex. App. - Dallas 1991, no writ); Royal Ins. Co. v. Hartford Underwriters Ins. Co., 391 F.3d 639, 644 (5th Cir. (Tex.) 2004); Lafarge Corp. v. Hartford Casualty Ins. Co., 61 F.3d 389, 400 (5th Cir. 1995) (applying Texas law). The general rule is stated as follows:

   It is the service of citation upon the insured which imposes on the insured the duty to answer to prevent a default judgment. No duty is imposed on an insurer until its insured is served and sends the suit papers to the insurer. This action by the insured triggers the insurer’s obligation to tender a defense and answer the suit.

   Branscum, 803 S.W.2d at 466-67. Thus, the insured is required by the policy to notify the insurer of suit and forward suit papers. This action is necessary to trigger the insurer’s duty to defend an insured. Travelers Indem. Co. v. Citgo Petroleum Corp., 166 F.3d 761 (5th Cir. 1999).

   Although seemingly straightforward, notice provisions in liability policies have generated much litigation, particularly on the question of whether or not breach by the insured must cause prejudice to the insurer in order to relieve the insurer of its duties under the policy.
B. **Condition Precedent or Covenant?**

In addressing the prejudice requirement, recent cases have addressed whether or not the insured’s obligation to provide notice is a “condition precedent” to the insurer’s liability, rather than a “covenant.”

1. **PAJ, Inc. v. Hanover.**

   In **PAJ, Inc. v. The Hanover Ins. Co.**, 170 S.W.3d 258 (Tex. App. – Dallas 2005, pet. filed), which involved “advertising injury” coverage, the insured argued that prejudice was required because (1) the notice provision is properly classified as a covenant rather than a condition, so that only a material breach of the covenant (one causing harm) will excuse performance; (2) the notice provision should be read in favor of coverage because its classification is ambiguous; and (3) even if notice is a condition to coverage, Texas courts still require a showing of prejudice before untimely notice will allow an insurer to avoid a claim.

   The **PAJ** court noted that a condition to a contractual obligation is an act or event that must occur before there is a right to immediate performance and before there can be a breach of the contractual obligation. *Id.* at 260 (citing *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976)). A contractual covenant, on the other hand, is a promise to perform, and a material breach of that promise can lead immediately to liability, including excuse of performance by the other party. *PAJ*, 170 S.W.3d at 260.

   Relying largely upon **Harwell v. State Farm Mut. Auto. Ins. Co.**, 896 S.W.2d 170, 173-74 (Tex. 1995), the court found that “Texas courts have consistently held that compliance with an insurance policy’s notice provision is a condition precedent to the insurer’s liability on the policy.” *Id.* Given the “settled nature” of this classification, the court next examined the language of the policy to determine if it expressed a clear intention to the contrary. The policy stated that “if a claim is made or ‘suit’ is brought against any insured, you must...[n]otify us as soon as practicable.” *Id.* at 261. The court noted that the notice language appeared under the same heading as the provision stating that no one may “sue [Hanover] on this Coverage Part unless all of its terms have been fully complied with.” *Id.* It then concluded that the placement and language of the provisions supported the conclusion that the insurer’s obligations are conditioned on compliance with the policy’s notice requirements. It accordingly held that notice was a condition precedent to the insurer’s liability, and that the insurer was not required to show prejudice from untimely notice.

   In concluding that the notice provision is a condition precedent, the **PAJ** court declined to follow **St. Paul Guardian Ins. Co. v. Centrum G.S. Ltd.**, 383 F.Supp.2d 891 (N.D. Tex. 2003), upon which the insured had relied.

2. **St. Paul Guardian v. Centrum.**

   In **St. Paul**, the insured did not dispute that notice was untimely, or that the delayed notice constituted a breach of the CGL policy. The issues before the court were whether St. Paul was required to establish prejudice to deny coverage for “personal injury”, and whether St. Paul had proven that it was prejudiced by the late notice. The St. Paul policy contained a provision which specifically limited a notice defense for “bodily injury” and “property damage” claims to instances in which it was prejudiced by the late notice. Despite this language, the court refused to interpret it to mean that the prejudice requirement applies only to bodily injury and property damage claims.

   More importantly, the court in **St. Paul** noted that, “the CGL policy does not expressly provide that the notice requirement is a ‘condition precedent’ to coverage or define the consequences of nonperformance of the notice requirement as to personal injury claims.” *Id.* at 896. Because “the CGL policy does not expressly provide that the notice requirement is a condition precedent to liability, and in light of the holdings in **Hanson** [**Hanson Prod. Co. v. Americas Ins. Co.**, 108 F.3d 627 (5th Cir. 1997)] and **Hernandez** [**Hernandez v. Gulf Group Lloyds**, 875 S.W.2d 691 (Tex. 1994)],” the court predicted that Texas courts would require St. Paul to show that it was prejudiced by the insured’s late notice before it could legitimately deny coverage under the policy. See also **Travelers Indem. Co. of Connecticut v. Presbyterian Healthcare Resources**, 2004 WL 389090 (N. D. Tex. 2004) (agreeing with the **St. Paul** court and requiring prejudice due to late notice in order to avoid “personal injury” coverage for defamation).
C. Consequences of Breach of Notice

An insured’s failure to give notice of suit to an insurer with a notice provision in its policy clearly is a breach of the policy. The consequences of that breach, however, are unclear under the present state of the law. If notice is a condition precedent to coverage and no showing of prejudice is required, the insurer can deny coverage under the policy. Unless and until the Texas Supreme Court accepts review of PAJ or another case involving this issue, the courts probably will continue to split on whether the insurer must first establish that it was prejudiced in order to defeat coverage.

III. DUTY TO COOPERATE

A. Implied and Express

Under Texas law, a duty to cooperate is implied in every contract in which cooperation is necessary for the performance of a contract. Bank One, Texas, N.A. v. Stewart, 967 S.W.2d 419 (Tex. App. – Houston [14th Dist.] 1998, pet. denied). This implied duty requires that the promisee not hinder, prevent, or interfere with the promisor’s ability to perform its duties under the agreement. Id.

In addition to an implied duty to cooperate, liability insurance policies include express cooperation clauses. A typical liability insurance policy will include the following or similar cooperation language in the “conditions” section of the policy:

- You and any other involved insured must:
  - (3) Cooperate with us in the investigation or settlement of the claim or defense against the “suit”; and


An insured has a duty to cooperate with its insurer in the defense of claims for which the insurer has a duty to defend. Quorum Health Resources, LLC v. Maverick County Hospital Dist., 308 F.3d 451, 468 (5th Cir. 2002) (citing State Farm Fire & Cas. Co. v. S.S., 858 S.W.2d 374, 385 (Tex. 1993)). These cooperation clauses are intended to guarantee to insurers the right to prepare adequately their defense on questions of substantive liability. Martin v. Travelers Indem. Co., 450 F.2d 542, 553 (5th Cir. 1971). Because of the provisions in the insurance policy granting the insurer the right to defend suits and requiring the insured’s cooperation, insureds are prohibited from making any agreement which would operate to impose liability upon the carrier or would deprive the carrier of the use of a valid defense. Rodriguez v. Texas Farmers Ins. Co., 903 S.W.2d 499 (Tex. App. – Amarillo 1995, writ denied) (insured’s failure to cooperate with insurer to set aside default judgment resulted in prejudice to insurer in amount of excess judgment; insurer not liable for default judgment).

B. Failure to Cooperate in Presenting Adequate Defense

In Costley v. State Farm Fire and Cas. Co., 894 S.W.2d 380 (Tex. App. – Amarillo 1994, writ denied), State Farm obtained a default judgment against the insured in a declaratory judgment action it filed due to the insured’s failure to cooperate in presenting an adequate defense in the case against him. Although the case involved a motion for new trial, the court examined whether the insured had a meritorious defense for purposes of the Craddock test by reviewing evidence that the insured cooperated with the insurer in presenting a defense.

The evidence revealed that the insured waited until five days before an answer was due to notify State Farm. State Farm agreed to defend under reservation. However, the insured refused to allow the attorney initially retained by State Farm (A-1) to defend him unless State Farm withdrew its reservation of rights letter. State Farm declined to withdraw the reservation of rights and, the insured retained another attorney to represent him in the lawsuit (A-2). State Farm agreed to pay the attorney retained by the insured (A-2), and then subsequently withdrew its reservation after determining that the insured was entitled to coverage. State Farm later became dissatisfied with A-2’s representation of the insured and retained another attorney (A-3) to defend him. The insured refused to agree to the substitution of counsel (A-3). State Farm advised the insured that it viewed his conduct as a repudiation of the policy, but nonetheless retained yet another attorney (A-4) to represent the insured when the insured expressed dissatisfaction with A-3. Without providing a reason, the insured refused to allow A-4 to represent him,
and insisted that he wanted A-2 to continue to represent him. State Farm informed the insured that it viewed his last refusal of furnished representation to be without good cause and a repudiation of the policy.

After reviewing this evidence, the court found that there were no facts or evidence to show that the insured cooperated with State Farm in presenting an adequate defense to the suit. Accordingly, the court found that the motion for new trial failed to set up a meritorious defense. Id. at 385; see Quorum Health Resources, LLC v. Maverick County Hospital Dist., 308 F.3d 451 (5th Cir. 2002) (finding fact issue as to whether insured breached its duty to cooperate by rejecting the lawyer offered by insurer, and by insisting upon separate counsel).

C. Duty to Mitigate Liability


The Warren and Laster cases involved the same set of facts and questions of law. The cases arose out of a personal injury lawsuit filed by Larry Laster against Inter County Concrete and its employee, Steve Warren. American National issued an excess liability insurance policy to Inter County, which afforded additional insurance to Warren. The primary insurer was Transit Casualty Company, which was placed into insolvency two months after the negligence suit was filed.

Warren, through his attorney, notified American of the lawsuit two months after Transit was placed into insolvency. American offered to provide Warren and Inter County with a defense on the condition that each agree that American did not waive its right to maintain that it would not be obligated to pay the first $1 million of any recovery by Laster. Inter County accepted American’s offer, but Warren rejected it, demanding an unconditional defense.

American subsequently sent Warren four separate letters reiterating its offer to provide a conditional defense, to which Warren provided no response. Warren’s attorney withdrew from the negligence case, leaving Warren with no attorney of record. Neither Warren nor his attorney informed American of the withdrawal, and the attorney continued to represent Warren with regard to legal advice concerning American. Shortly after the withdrawal, Warren was served with a request for admissions in which he was asked to admit liability. Warren did not answer the request, and the requests were deemed admitted. Laster filed a motion for partial summary judgment on the basis of the deemed admissions. American was not notified of the hearing, and Warren failed to attend. The court entered a judgment in favor of Laster against Warren for approximately $2.9 million.

After the judgment became final, Warren notified American of its existence and demanded payment. Warren also assigned to Laster two-thirds of the net recovery, if any, against American. Warren filed the state court action against American, and Laster filed suit against American in U.S. District Court; both sought the amount of the judgment plus damages under the DTPA and the Insurance Code for American’s failure to provide an unconditional defense to Warren.

Noting that, “American is at the mercy of the insured to see that proper steps are taken in the defense of a legal action brought against the insured to establish the existence and amount of his legal liability, if any,” the U.S. District Court found that the insured’s obligation to take reasonable steps to avoid legal liability or to minimize the amount of his legal liability is implicit in the excess insurance contract. Laster, 775 F.Supp. at 995; see also Warren, 827 S.W.2d at 187-88 (there is an obligation on the part of an insured in an excess insurance contract of this kind to take reasonable steps to avoid or minimize legal liability). The court further stated that the insured cannot assume liability or engage in conduct that is intentionally calculated to allow, or cause, legal liability to be created for which the excess carrier will liable under the policy, without the carrier’s knowledge and consent. Laster, 775
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F.Supp. at 995. Both courts noted from the record that “a more glaring case of lack of cooperation by an insured and of calculated disregard of an excess insurer’s rights would be difficult to find.” Id. at 999; Warren, 826 S.W.2d at 188. Both courts held that Warren did not take reasonable steps to minimize American’s legal liability and that his lack of cooperation precluded liability against the insurer.

2. **Britt v. Cambridge.**

In finding that the insured had a duty to take reasonable steps to avoid or limit liability, both the *Laster* court and the *Warren* court cited *Britt v. Cambridge Mutual Fire Ins. Co.*, 717 S.W.2d 476 (Tex. App. – San Antonio 1986, writ ref’d n.r.e.). *Britt* was a declaratory judgment action filed by Cambridge, a homeowner’s insurer, against its insureds regarding its duty to defend in a negligence lawsuit arising out of Britt’s murder of his aunt.

In connection with the negligence suit, Cambridge agreed to provide an unqualified defense to Britt’s parents, but refused to provide an unqualified defense to Britt. Cambridge retained the same lawyer to defend all of the insureds. Britt filed a motion to disqualify the attorney due to an alleged conflict of interest, and the court removed the attorney, replacing him with an attorney of Britt’s choice. The plaintiffs then nonsuited Britt’s parents, thus removing from the case the only lawyer affiliated with Cambridge. The plaintiffs and Britt then entered into an agreement whereby plaintiffs agreed only to levy execution on insurance proceeds in exchange for Britt’s agreement to waive procedural formalities and provide documents and testimony without the necessity of formal proceedings. The plaintiffs subsequently appeared in the court’s chambers for a “trial” at which Britt was not in attendance. Cambridge was not represented at the proceeding. A judgment in excess of $2 million was later entered. Unaware of the judgment had been entered, Cambridge filed a motion to intervene in the lawsuit and set it for hearing. The plaintiffs’ attorney requested postponement of the hearing, and Cambridge agreed to it. Before the hearing, but after the judgment had become final, the plaintiffs’ attorney informed Cambridge of the judgment.

In reviewing whether or not Cambridge could collaterally attack the judgment, the court considered whether or not Britt had failed to conduct a reasonable defense, and whether the parties had colluded to defraud Cambridge. The court relied upon *The Restatement (2d) of Judgments* § 57 (1982), which provided that an indemnitor was precluded from relitigating issues determined against the indemnitee if the indemnitee defended the action with due diligence and reasonable prudence. The court agreed that the evidence was sufficient for the trial court to find that the insured failed to conduct a reasonable defense and that the parties colluded to defraud Cambridge. *Id.* at 483. It therefore held that Cambridge could collaterally attack the judgment.

Note that in *Ross v. Marshall*, 426 F.3d 745 (5th Cir. 2005), in determining whether the insurer had a sufficient interest to permit intervention in the liability action against its insured, the court cited *Britt* and reasoned that, “an insurer that reserves its rights does not surrender its interest in minimizing the liability of its insured....Further, an insured who rejects an insurer’s offer of a qualified defense must either reach a reasonable settlement or provide a reasonable defense in order for its insurer to be bound by any ensuing judgment.” *Ross*, 426 F.3d at 758.

3. **ACE v. Dorismond.**

*ACE Property & Cas. Ins. Co. v. Dorismond*, 88 Fed.Appx. 695, 2004 WL 256557 (5th Cir. 2004) (not designated for publication) was a declaratory judgment action which involved the question of whether or not the insured had a duty to mitigate liability and, if so, whether it breached that duty.

Dorismond sued Service Merchandise for injuries she sustained in its retail store. Because Service had filed for bankruptcy two months earlier, the suit was stayed. Dorismond eventually agreed to seek only insurance proceeds, and the stay was lifted. ACE provided an excess liability policy to Service covering damages over $250,000. After the bankruptcy court allowed the suit to move forward, Service notified ACE of the suit, although it had been over five years since the injury and over three years since the suit was filed. Service also informed ACE that it did not intend to defend the personal injury suit in view of the fact that Dorismond had waived any right to recover from it. Neither Service nor ACE appeared at trial, and the trial court entered a default judgment against Service in excess of $400,000.
The Fifth Circuit affirmed summary judgment in favor of ACE on the ground that the insured’s conscious failure to defend itself in the personal injury suit relieved ACE of the duty to indemnify [ACE had no defense obligation under its policy]. The court concluded that, “Texas courts and federal courts applying Texas law have made statements regarding the general duty of an insured to minimize legal liability. Though these courts have not provided the precise contours of an insured’s duty, the statements suggest that the insured must take some kind of minimum action to limit liability to the insurer.” Id. at 697-98. In arriving at this conclusion, the court relied upon Laster and State Farm Fire and Cas. Co. v. Gandy, 925 S.W.2d 696, 714 (Tex. 1996). Specifically, the court relied upon the language in Gandy where the Texas Supreme Court stated, “In no event, however, is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant’s insurer.” Id. at 697-98 fn. 7. The court, therefore, found that Service had an implied duty to take action to mitigate liability arising from Dorismond’s suit.

The court went on to find that, because Service had a duty to take some action to limit damages, its inaction “fell outside any reasonable expectations one may have of an insured” and provided an “egregious example of avoiding a ‘fully adversarial trial’ or even some sort of aggressive settlement negotiation.” Id. at 698. Because this inaction constituted a breach of Service’s duty owed to ACE to mitigate damages, ACE was relieved of any indemnity obligation under the policy.

4. Evanston v. Encore

In Evanston Ins. Co. v. Encore Medical Staffing, Inc., 2005 WL 2561645 (S.D. Tex. October 12, 2005), cited Dorismond and stated that “such inaction [that results in default judgment] on the part of an insured may negate an insurer’s obligation to indemnify the insured for the default judgment.” Evanston, 2005 WL *5. Because the parties had not adequately briefed the issue, and because the court was not persuaded that there were not fact questions on that point, summary judgment was denied.

D. Consequences of Failure to Cooperate

A breach of the duty to cooperate ordinarily results in a breach of contract which relieves the non-breaching party, here the insurer, of its obligations to further perform under the policy. However, at least one court of appeals has held that an insurer under a liability policy may be entitled to rescind the policy if the insured materially breaches its duty to cooperate in the defense of the suit. Costley v. State Farm Fire and Cas. Co., 894 S.W.2d 380 (Tex. App. – Amarillo 1994, writ denied).

In Costley, State Farm contended that the insured’s failure to cooperate was a repudiation of the policy, and that it was entitled to rescind the policy. The insured contended that a failure to cooperate was a simple breach of contract entitling the insurer to reimbursement of expenses that it incurred in defending him.

Ordinarily, repudiation by one party entitles the other party to accept the repudiation and rescind the contract. Id. at 386 (citing Gage v. Wimberley, 476 S.W.2d 724, 731 (Tex. Civ. App. – Tyler 1972, writ ref’d n.r.e.)). The court of appeals in Costley agreed with the insured that a failure to cooperate results in a breach of the contract and not a repudiation. The insured, therefore, argued that rescission was unavailable to State Farm because full relief at law was available for his breach of contract through a request for reimbursement of the defense costs expended in the negligence action. The court rejected this argument due to the fact that the insured’s cooperation was necessary in order for State Farm to determine the amount and probability of its possible liability under the policy, as well as to properly analyze and defend the suit against the insured. Id. at 386. Because of this “necessity,” any failure by the insured to cooperate was material and went to the essence of the contract; thus, an action for damages was not an adequate remedy at law. The court, therefore, found that rescission was properly considered as a remedy for the insured’s breach of contract.

IV. Compliance with Consent Clauses

A. Consent to Settle.

General liability insurance policies typically contain a “voluntary payments” provision in the
conditions section of the policy which states as follows:

c. No insured will, except at that insured’s own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.


Motiva involved alleged violations of an umbrella policy’s consent-to-settle and cooperation clauses. Motiva was sued in several actions following an explosion at one of its plants. Motiva notified National Union, which provided $25 million in umbrella coverage, of the lawsuits. National Union “disclaimed” coverage due to a lack of exhaustion of the underlying insurance policies. National Union subsequently withdrew its disclaimer with a reservation of rights letter. Two months later, Motiva informed National Union that one of the underlying insurers had exhausted its policy limits, and requested that National Union send a representative to a mediation of one of the lawsuits scheduled ten days later. National Union immediately requested all documents relevant to the lawsuit, but Motiva declined on the basis that National Union had “never acknowledged coverage.” Two days prior to the mediation, National Union tendered an offer to defend the lawsuits subject to a reservation of its right to deny coverage under the terms of the policy. National Union requested Motiva’s full cooperation with the defense, and advised that it would participate fully in the scheduled mediation.

A National Union representative attended the mediation. While the National Union representative was in attendance, the only settlement demand it received was for $40 million. However, National Union was asked to leave the mediation before it had ended, and its representative complied. The mediation continued, ultimately ending with Motiva’s agreement to pay $16.5 million to resolve the lawsuit. After the mediation, Motiva asked National Union to fund the settlement. National Union declined, contending that Motiva had failed to obtain its consent to settle as required by the policy. Motiva paid the settlement and requested reimbursement from National Union, but National Union maintained its position that it did not owe the funds because of breach of the consent to settle clause.

Motiva maintained that it was entitled to settle without National Union’s consent because National Union had tendered a qualified defense subject to a reservation of rights. Motiva’s position essentially was that it was not constrained by the consent to settle clause because of the insurer’s reservation of rights. Relying upon the Texas Supreme Court decision in State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38 (Tex. 1998), the Fifth Circuit concluded that an insurer which tenders a defense subject to a reservation of rights is entitled to enforce the consent to settle clause in the policy. Therefore, the court found that the district court did not err in holding that Motiva breached the policy by settling without National Union’s consent.

However, the court ultimately remanded the case to the district court for a determination of whether National Union was actually prejudiced by Motiva’s settlement. In doing so, the court relied upon the Texas Supreme Court decision in Hernandez v. Gulf Group Lloyds, 875 S.W.2d 691, 692 (Tex. 1994). Although it involved a first-party claim for underinsured motorist benefits under an automobile policy, the Texas Supreme Court held in Hernandez that an insurer may deny coverage where the insurer is actually prejudiced by the insured’s settlement in violation of a “settlement without consent” clause. Id. at 693. See also Comsys Information Technology Services, Inc. v. Twin City Fire Ins. Co., 130 S.W.3d 181 (Tex. App. – Houston [14th Dist.] 2003, rev. denied) (consent provision will not operate to discharge the insurer's obligations under the policy unless the insurance company is actually prejudiced or deprived of a valid defense by the actions of the insured).

Finally, the Fifth Circuit in Motiva concluded that questions of fact were presented as to whether the fact that Motiva asked National Union to leave the mediation amounted to a breach of the cooperation clause and, if so, whether it operated to National Union’s prejudice.
B. Voluntary Payments.

In *E. & L. Chipping Co., Inc. v. Hanover Ins. Co.*, 962 S.W.2d 272 (Tex. App. - Beaumont 1998, no writ) the court of appeals considered whether the insured’s failure to notify the insurer of three lawsuits at any time during the pendency of the suits relieved the insurer of a duty to defend the suits. The court reviewed the policy conditions and found that prompt written notice of suit and immediate forwarding of a copy of the suit were conditions precedent to the duty to defend, regardless of any prejudice. *Id.* at 278. However, the policy also contained a voluntary payments provision which stated that the insured would not “except at [its] own cost, voluntarily make a payment, assume any obligation, or incur any expense…without our [insurer’s] consent.” The court found that the insured, in defending the lawsuits without notice to the insurer, voluntarily undertook payment of defense costs contrary to the policy’s voluntary payments provision. The court ultimately held that the insured was not entitled to recover the costs of defending the suits because the duty to defend was never triggered in the absence of notice of the filing of the suits, and because the insured voluntarily undertook costs of defending the suits. *Id.*

C. Other Consent Clauses.

In *International Ins. Co. v. RSR Corporation*, 148 Fed.Appx. 226 (5th Cir. 2005) (not designated for publication), the policy at issue was a claims-made environmental impairment liability policy which contained a provision requiring International’s consent before making “any admission or negotiate[ing] any offer, promise or payment in connection with any incident or claim.” RSR filed suit seeking a declaration that it owed no duty to indemnify RSR for remediation costs because RSR breached a condition to its performance when it entered into a tolling agreement with the EPA without International’s written consent. The tolling agreement barred RSR’s statute of limitations defense to an EPA claim. The court went on to find, however, that International was required to show that it was prejudiced by RSR’s breach. In finding that there was a prejudice requirement, the court relied upon *Hanson Prod. Co. v. Americas Ins. Co.*, 108 F.3d 627 (5th Cir. 1997) (insurer seeking to avoid policy based on notice defense must show prejudice) and *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994) (requiring insurer to establish prejudice to avoid coverage based on settlement-without-consent provision).

V. Compliance with “No Action” Clauses

In *State Farm Lloyds Ins. Co. v. Maldonado*, 963 S.W.2d 38 (Tex. 1998), the Texas Supreme Court held that a suit against the insured based on uncontested evidence was not an “actual trial” within the meaning of a policy provision entitling victim to recover on agreed settlement or final judgment against insured after actual trial.

The actual trial condition provided that, “A person or organization may sue [State Farm] to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial.” Noting that the insured was initially obligated to show that he complied with conditions precedent, the Court found that neither the insured nor his assignee could recover for breach of contract because the trial violated the “actual trial” condition of the policy. According to the Court, an “actual trial” contemplates a genuine contest of issues. See *Wright v. Allstate Ins. Co.*, 285 S.W.2d 376, 379-80 (Tex.Civ.App.-Dallas 1955, writ ref’d n.r.e.) (“‘judgment following [an] actual trial’ relates to … a contest of issues leading up to a final determination by court or jury, in contrast to a resolving of the same issues by agreement of the parties; i.e., without a contest.”) (emphasis in original); see also *Emmscor Mfg., Inc. v. Alliance Ins. Group*, 879 S.W.2d 894, 908 (Tex.App.-Houston [14th Dist.] 1994, writ denied) (no-action clause required insured’s full compliance with all the terms of the policy and a determination of Emmscor's obligation to pay either by judgment after actual trial or by written agreement of Emmscor, plaintiffs, and Alliance). The Court noted that, although Maldonado presented evidence to a judge who later made findings of fact and conclusions of law, the evidence was uncontested. The insured did not appear at trial, his attorney did not cross-examine any witnesses or put on any of his own, his attorney made no argument to the court.
contesting liability or damages and at one point even referred to the trial as a “hearing.” In sum, there was no real contest of issues. This is not a situation where the insured has entered into an agreed judgment or settlement as a result of the insurance company’s refusal to offer the insured a defense. On the facts before us, we hold that this was not an “actual trial” as contemplated by the insurance policy. Because State Farm agreed to defend Robert under a reservation of rights and Robert failed to satisfy a condition precedent of the insurance policy, Robert cannot sue or recover on the policy. Interestingly, the Court did not address whether prejudice was required.

In Minter v. Great American Ins. Co. of New York, 423 F.3d 460 (5th Cir. 2005), the insurer relied upon the Texas Supreme Court decisions in Maldonado, Cowan, and Gandy for the proposition that an underlying judgment was unenforceable because it did not result from an “actual trial.” Id. at 472-73. Specifically, the insurer argued that liability and damages were not “vigorously litigated.” The underlying judgment in Minter followed the insured’s failure to answer discovery requests, respond to a motion for summary judgment on liability, participate in a pretrial hearing, participate in jury selection, make an opening statement, cross examine witnesses or object to evidence, call witnesses or otherwise present evidence in his defense (the insured proceeded to trial pro se). Great American had provided excess insurance over a $1 million primary policy issued by St. Paul. Although it notified St. Paul of the lawsuit, the agent failed to notify Great American of the suit.

The Fifth Circuit found that the Texas Supreme Court cases relied upon by Great American were distinguishable from the case before it. Specifically, it noted that there was no evidence of collusion between the plaintiff and defendants, and further noted that one of the insureds defended himself pro se. The court held that Great American had constructive knowledge of the suit because of the insured’s notice to the agent. Therefore, the court held that, because the insurer had constructive notice of the suit as well as the right (but not the duty) to defend, it was precluded from collaterally attacking the judgment. Id. at 473.

Crocker v. National Union Fire Ins. Co., 2005 WL 1168429 (W.D. Tex. 2005) involved a $1 million default judgment against a nursing home employee who failed to defend the suit. The evidence indicated that the employee failed to appear at trial because he could not afford counsel and did not know of National Union’s duty to defend him. National Union contended that a fully adversarial trial was a condition precedent to its liability on the policy and, because there was not one, it was not obligated to pay the judgment. National Union further relied upon Gandy, arguing that a judgment rendered without a fully adversarial trial is never binding on the insurer. The plaintiff/judgment creditor argued that Great American was required to show prejudice in order to avoid liability. Citing Hanson and Hernandez, the court agreed, finding that National Union was required to establish prejudice to escape liability. Although National Union relied upon Maldonado, the court distinguished it on the basis that there was an actual trial in the case before it – the insured’s co-defendant was represented by counsel and the case against both was tried together. Furthermore, because there was no conscious decision by the insured not to defend the suit, the court distinguished the case from ACE v. Dorismond. Finally, because Gandy involved assignments of choses in action, something not at issue in Crocker, the court declined to apply it in deciding whether National Union was bound by the judgment.