CRS § 10-3-1118

Clarifying Cooperation in First-Party Insurance Policies

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This article discusses new CRS § 10-3-1118, which addresses the "failure to cooperate" defense in first-party insurance claims.

Before the enactment of CRS § 10-3-1118 (the Act) in September 2020, Colorado law had long recognized that an insurer could deny an insurance claim if the insured failed to reasonably cooperate in the investigation, handling, or defense of a first-party or third-party claim. This rule, premised on a policy's specific language, makes sense in the context of both a first-party claim (e.g., if you want your car damage repaired, you must allow the insurer to inspect it) and a third-party claim (e.g., to protect the insured person from a lawsuit, the insurer must be able to speak with him or her to determine the facts). Surprisingly, however, the "failure to cooperate" defense was not explicitly defined, there was no fixed standard for applying it, and no pattern jury instruction existed for this defense. This lack of clarity resulted in a collection of trial court orders applying the defense in potentially inconsistent ways. For example, some, but not all, courts held that the defense required some notice and opportunity to cure.

With the enactment of CRS § 10-3-1118, an insurer's assertion of the failure to cooperate defense is clarified, standardized, and subject to certain pre-litigation requirements. The Act defines the failure to cooperate and requires an insurer to satisfy specific requirements before asserting an insured's failure to cooperate as a defense to a claim for benefits.[1]

This article covers the historical use of the failure to cooperate defense, recounts the Act's legislative history, and summarizes the Act's new requirements.

Evolution of the Cooperation Requirement

In the past, an insured's duty to cooperate arose from an insurance contract's express language. For example, uninsured/underinsured motorist insurance policies typically set forth the cooperation requirements in two different clauses:

> (1) Medical Reports
>
> The injured person may be required to take medical examinations by physicians we choose, as often as we reasonably require. We must be authorized to obtain medical reports and other records pertinent to the claim. We may also require any person making a claim to submit to questioning under oath and sign the transcript.
>
> (2) Assistance and Cooperation of the Insured
>
> An insured person must cooperate with us in the investigation, settlement, and defense of any claim or lawsuit. If we ask, that person must also help us obtain payment from anyone who may be jointly responsible.

Before the Act, Colorado law remained mostly silent as to the applicability of the failure to cooperate defense, leaving courts to address on a case-by-case basis whether an insured's action or inaction constituted a failure to cooperate. Thus, trial courts did not interpret cooperation clauses consistently, and they typically required the insurer to bear the burden of proving that the insured failed to cooperate, such failure was accompanied by the insured's bad faith, and the insurer suffered substantial and material prejudice. It remained unclear whether a finding of a failure to cooperate would result in the insured losing all or part of a policy's benefits. And while it was generally understood that the failure to cooperate defense must be predicated on the insured's failure to comply with an insurer's reasonable request,[2] it has been argued that such request is not required. This point of contention is important because Colorado courts have generally held that an insured may lose all benefits by failing to comply with a reasonable request, though no case requires that result.[3]

The Case Law Construction

The Colorado Supreme Court has not specifically addressed the failure to cooperate defense[4] since the 1949 case *Farmers Automobile Inter-Insurance Exchange v. Konugres*.[5] There, the Court held that

> [o]bviously it is not every failure to accede to the company's request for assistance that will have the effect of defeating the rights of the assured under his policy. Generally speaking, to constitute a breach of the co-operation provision of the contract, there must be a lack of co-operation by the assured in some material and substantial respect, and any formal, inconsequential, or collusive lack of co-operation will be immaterial.[6]

Thus, under *Farmers*, to breach the failure to cooperate requirement, the insured must knowingly fail to cooperate in some material or substantial respect, and only after a reasonable request is made.[7]

Since *Farmers*, Colorado courts have taken a case-by-case approach to evaluating whether particular conduct constitutes a failure to cooperate under particular policy language, construing substantial and material prejudice to occur only where the insured's actions prevent the insurer from performing a reasonable investigation or leave the insurer without the means to investigate the validity of the insured's claim.[8]

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More recently, in 2001, the Colorado Court of Appeals addressed the specific allegation that an insured's refusal to submit to an examination under oath without his co-insured spouse supported the insurer's denial of benefits. The Court held that the insurer's denial of all benefits was improper because the policy did not require an examination under oath without the co-insured spouse.[9] The Court noted that had the insurer intended to require examinations under oath to take place without anyone else present, it could have set forth that condition in the policy.[10] A commonsense example of a failure to cooperate is illustrated in *State Farm Mutual Automobile Insurance Co. v. Secrist*, where, in a third-party case, the Court confirmed that an insured breached the duty to cooperate by discharging his retained counsel, failing to respond to the insurer's request for information, and admitting liability without the insurer's consent.[11]

In recent years, insurers have asserted the defense more frequently and in unexpected circumstances, without an underlying change in typical policy language. In many cases, the insurer made no mention of the alleged failure to cooperate during the claim process or in its reservation of rights communications.[12] Rather, it first asserted the claim as a defense to the litigation. This can present unique practical concerns, particularly where the insurer did not give notice before filing of its intent to assert the defense, or where the insured's litigation counsel also served as the insured's counsel in making the insurance claim. For example, if the defense was asserted as justification for taking the insured's lawyer's deposition, the lawyer would have to withdraw from the case under the advocate/counsel rule (Colo. RPC 3.7) and potentially disclaim a fee if required to be a witness. Asserting the defense in this manner also arguably interfered with the contractual and personal relationship between the attorney and the client, and some practitioners felt it discouraged counsel from suing insurers.

The Act aims to address such concerns. It is directed at both an insured's and an insurer's duties with respect to the cooperation clause,

addresses conduct that can be considered substantial or material in the context of cooperation, and limits the portions of a claim subject to denial based on a failure to cooperate. The Act clarifies that "prejudice" to the insurer occurs in its ability to handle the claim and limits the defense's application to information the insurer is unable to obtain on its own (such as protected records requiring a release authorization). This prevents an insurer from requiring a level of cooperation from an insured that would be contrary to the insurer's common law and statutory claim investigation duties. The Act addresses these issues by requiring the insurer to identify the specific information it seeks and to give the insured written notice of the request for information and a chance to cure any failure to provide it.

The Act's Legislative History

Majority Leader Alex Garnett introduced HB 20-1290 (the bill) on February 7, 2020. The bill focused on clarifying the law and rules surrounding the failure to cooperate defense. Senator Stephen Fenberg co-sponsored the bill.[13] Once introduced, it was assigned to the House Judiciary Committee, which held a hearing on March 10, 2020. Proponents from the Colorado Trial Lawyers Association and opponents from the Colorado Defense Lawyers Association testified about the pros and cons of the proposed bill.[14] Ultimately, the committee passed the bill 7 to 1 after adopting several changes requested by the bill's opponents.[15]

As HB 20-1290 made its way through the House, it was amended again to address additional concerns from its opponents.[16] Eventually, the bill passed 45 to 19 with one representative excused.[17] From there, it went to the Senate, where it was approved 20 to 15 without further amendments.[18] Governor Polis signed the bill into law on July 2, 2020.[19]

The Nuts and Bolts

The Act created a new statute, CRS § 10-3-1118, which is largely focused on the notice and opportunity to cure an insurer must provide to its insured before it can "plead or prove a failure-to-cooperate defense . . . in a court of law or an arbitration."[20] The statute applies only to litigation or arbitration concerning insurance policies providing first-party benefits or coverage.[21] However, Colorado case law interprets some duties under a third-party liability policy to be first-party duties, such as the duty to pay for defense fees and costs.[22] Accordingly, the Act will likely be construed to apply to first-party benefits contained in any insurance policy.

The Act mandates prerequisites to raising the failure to cooperate defense. Insurers must first request, in writing, the information or action they want from their insureds.[23] That request must be sent by certified mail or, if the insured or the insured's attorney has consented, via electronic means.[24] Insurers may not request information that they can obtain without their insureds' assistance,[25] such as police reports or other documents that are available to the general public without Health Insurance Portability and Accountability Act (HIPAA) or other privacy releases.

Further, an insurer may request only information that a reasonable person would determine is necessary to adjust the insured's filed claim or to prevent fraud.[26] As applied, this provision may, for example, prohibit an insurer from requesting obstetric records from an insured whose issues are related to the neck and shoulder.[27] However, an insurer could request records about a neck surgery three years before an incident that reaggravated that neck injury.[28] Finally, an insurer must give its insured 60 days to respond to its request.[29]

If an insured does not respond to the request, or if an insurer is not satisfied with the response, the insurer may then send its insured a written notice alleging a failure to cooperate.[30] The notice must be sent within 60 days of the alleged failure to cooperate[31] and must (1) be in writing, (2) describe with particularity the alleged failure to cooperate, and (3) allow the insured 60 days from receipt of the notice to cure the alleged failure.[32]

If the insurer complies with all of the above requirements and still believes the insured has not cooperated with its claim investigation, it may plead failure to cooperate as an affirmative defense in court or in arbitration. The Act resolves uncertainty regarding whether this defense is a "complete" defense allowing an insurer to deny a claim in its entirety; it clarifies that the defense applies only to that portion of a claim "materially and substantially prejudiced to the extent the insurer could not evaluate or pay that portion of the claim."[33] For example, if an insured failed to provide evidence of lost wages resulting from an injury but did provide medical records and bills, an insurer might assert the affirmative defense in relation to the lost wages portion of the claim, but not in relation to the insured's economic or non-economic damages based on the injuries and medical treatment or expense.

The Act also addresses how it interacts with existing law. First, it provides that the existence of a duty to cooperate does not relieve the insurer's duty to investigate or to comply with CRS § 10-3-1104 (the statute that bans unfair or deceptive insurance practices).[34] Second, the Act states that "any language in a first-party policy that conflicts with this section is void as against the public policy of Colorado."[35]

Finally, the Act states that insurers cannot be held responsible for delays that are caused solely by the time taken by an insured to respond to a written request for information or written notice of failure to cooperate.[36] Insurance companies can be held liable under common law for bad faith breach of an insurance contract or for unreasonably denying or delaying a claim under CRS §§ 10-3-1115 and -1116. The Act's 60-day notice requirement and the 60-day opportunity to cure could delay the claims handling process, so the Act makes clear that insurers are not liable for bad faith claims for delays caused solely by complying with the Act's new requirements. But if delay was caused by some action other than complying with the Act's time requirements, or by the time requirements combined with some unreasonable act by the insurer, the insurance company may be liable. And it could be argued that asserting a failure to cooperate defense while failing to comply with the Act may, in and of itself, constitute bad faith conduct.

The Foreseeable Impact on Insurance Litigation

The Act became effective September 13, 2020 and applies to "litigation that occurs on or after" that date.[37] Questions regarding the Act's initial application may arise. For example,

insureds may argue that the Act applies to existing litigation because it applies to litigation that is "occurring" after the effective date. Or they may argue that the Act cannot be applied retroactively to existing litigation because such application would constitute an impermissible interference with contract.

On a practical level, to ensure compliance with the Act, insurers should train their claims representatives to be very specific when seeking information from insureds and their counsel. Staff should also be trained on the Act's new requirements and deadlines. Moreover, insurers' counsel will need to examine claim files for information that meets the statutory prerequisites for asserting a failure to cooperate defense.

Conclusion

CRS § 10-3-1118 clarifies the applicability of the failure to cooperate defense by enumerating specific duties for both insurers and insureds during the claims investigation process. While issues regarding its retroactive application may arise, the Act should help trial courts and arbitrators to analyze the merits of the defense more consistently and thus bring uniformity to litigation and arbitration concerning insurance policies providing first-party benefits or coverage. CL



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NOTES

1. Colorado has not decided whether an insured's failure to cooperate is an affirmative defense, a failure of a condition precedent, or something else. It has also been argued that failure to cooperate is a distinct breach of contract, requiring assertion of a counterclaim for such breach.

2. *Hansen v. Barmore*, 779 P.2d 1360 (Colo.App. 1989).

3. *Soicher v. State Farm Mut. Auto. Ins. Co.*, 351 P.3d 559, 565 (Colo.App. 2015) (indicating that coverage may be forfeited depending on the scope of the specific policy provision at issue). It remains an open question whether a failure to cooperate on one aspect of the claim, such as income loss, voids coverage for other independent claims, such as medical expenses.

4. In *State Farm v. Brekke*, 105 P.3d 177, 189 (Colo. 2004), the Colorado Supreme Court noted that each party to an insurance contract owes duties to cooperate with the other.

5. *Farmers Auto. Inter-Ins. Exchange v. Konugres*, 202 P.2d 959, 963 (Colo. 1949).

6. *Id.* at 963 (citations omitted).

7. *See Hansen*, 779 P.2d at 1364 (stating that recovery under an insurance policy may be forfeited if the insured fails to cooperate in a material or substantial respect).

8. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds* § 3.2 (Thomson Reuters 6th ed. 2016); *Walker v. State Farm Fire & Cas. Co.*, 16-CV-00118-PAB-STV, 2017 WL 1386341 at *4 (D.Colo. Feb. 23, 2017), report and recommendation adopted, 16-CV-00118-PAB-STV, 2017 WL 1386346 (D.Colo. Mar. 17, 2017).

9. *Ahmadi v. Allstate Ins. Co.*, 22 P.3d 576, 578 (Colo.App. 2001).

10. *See id.*

11. *State Farm Mut. Auto. Ins. Co. v. Secrist*, 33 P.3d 1272, 1275 (Colo.App. 2001).

12. Such a circumstance may or may not also violate Colorado law prohibiting an insurer from asserting a reason for denial in defending litigation different from the reasons asserted before litigation. *See U.S. Fid. & Guar. Co. v. Budget Rent-a-Car Sys. Inc.*, 842 P.2d 208, 210 n.3 (Colo. 1992) (holding "An insurer should raise (or at least reserve) all defenses within a reasonable time after learning of such defenses, or those defenses may be deemed waived or the insurer may be estopped from raising them."); *Fed. Life Ins. Co. v. Wells*, 56 P.2d 936, 938 (Colo. 1936) (stating "In basing its denial of liability and its refusal to pay upon that ground only, the defendant waived the right to insist upon all other grounds of objection, including failure to comply with the provisions concerning the time to give notice."); *Colard v. Am. Family Mut. Ins. Co.*, 709 P.2d 11, 15 (Colo.App.1985) (finding "[Defendant] waives its right to assert failure to timely forward suit papers as a defense because it denied liability on the basis of coverage only and did not assert the notice defense until after judgment was entered . . . and this declaratory judgment action was instituted.").

13. https://leg.colorado.gov/bills/hb20-1290.

14. Proponents of the bill testified that insureds needed protection from inconsistent, unfair, or unreasonable application of the failure to cooperate defense, especially when the defense was raised for the first time only after a lawsuit was filed, and that clarification was needed regarding appropriate remedies for a failure to cooperate. Opponents' concerns focused on the assertion that the failure to cooperate defense is rarely used, and the bill is therefore a solution for a problem that does not exist, would be unique in the nation, would discourage insureds from cooperating, and would cause premiums to rise. Opponents also expressed concern that the bill created standards with which insurers would have difficulty complying and could expose insurers to bad faith claims. *See* https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20200310/-1/9964.

15. *See* HB 20-1290, House Committee of Reference Report, https://leg.colorado.gov/sites/default/files/2020a_hb1290_h_jud_001.pdf.

16. https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2020A/amendments/HB1290_L.003.pdf.

17. https://leg.colorado.gov/content/hb20-1290vote068016.

18. https://leg.colorado.gov/content/hb20-1290vote56317d.

19. https://leg.colorado.gov/sites/default/files/2020a_1290_signed.pdf.

20. CRS § 10-3-1118(1).

21. *Id.*

22. *See D.R. Horton, Inc. Denver v. Mt. States Mut. Cas. Co.*, 69 F.Supp.3d 1179, 1198 (D.Colo. 2014); CRS § 13-20-808(1)(b)(ii). *Cf. Wheeler v Reese*, 835 P.2d 572 (Colo.App. 1992).

23. CRS § 10-3-1118(1)(a).

24. CRS § 10-3-1118(1)(a)(I)–(II).

25. CRS § 10-3-1118(1)(b).

26. CRS § 10-3-1118(1)(d).

27. *Id.*

28. *Id.*

29. CRS § 10-3-1118(1)(c).

30. CRS § 10-3-1118(1)(e).

31. CRS § 10-3-1118(1)(e)(I).

32. CRS § 10-3-1118(1)(e)(I)–(II).

33. CRS § 10-3-1118(2).

34. CRS § 10-3-1118(3).

35. CRS § 10-3-1118(4).

36. CRS § 10-3-1118(5).

37. *See* HB 20-1290 § 2, https://leg.colorado.gov/sites/default/files/2020a_1290_signed.pdf.