Examination Under Oath

“Looks Like a Dep … Walks Like a Dep … But It’s Not Just Another Deposition”

An Analysis of an Insurer’s Right to Examine Its Insured

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Background

Experienced lawyers who approach their first examination under oath as they would a discovery deposition typically find themselves in for a shock. Thus, the attorney representing the insured may find himself less than prepared to present his client for questioning; and similarly, the attorney representing the insurer may find that she is uncertain of the scope and depth of the insurer’s right to examine its insured.

While property insurance policies differ somewhat amongst insurers, most policy forms provide the insurer with a right to demand the “examination under oath” (“EUO”) of its insured, and a right to demand records and documents in support of the presented claim.

The standard policy provision respecting an insurer’s right to conduct an EUO typically provides:

YOUR DUTIES AFTER LOSS.

After a loss to which this insurance may apply, you shall see that the following duties are performed:

As often as we reasonably require:

Provide us with records and documents we request and permit us to make copies;

(and) submit to examinations under oath and subscribe the same. . .

Simply, an EUO is a formal proceeding during which an insured, while under oath and typically in the presence of a court reporter, is questioned by a representative of the insurer regarding the presented claim. In 1884, the Supreme Court of the United States first dictated the purpose of an EUO:
The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath . . . was to enable the company to possess itself of all knowledge, and all information as to 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. *Claflin v. Commonwealth Insurance Co.*, 110 U.S. 81, 94-95 (1884).

Before conducting an EUO, it is vitally important to review the relevant case law and statutes in the specific jurisdiction of inquiry. As in most areas of the law, rules unique to different jurisdictions often govern specific procedural and substantive issues.

**Recorded Statement Not a Substitute for an EUO**

In *Downie v. State Farm Fire and Cas. Co.*, 84 Wash. App. 577, 929 P.2d 484 (1997), the Washington Court of Appeals examined the issue of substantial compliance and ruled that a recorded statement is *not* a substitute for an EUO, and that it does not excuse the insured from submitting to an EUO. In that case, the insured, Thomas Downie, filed a claim for a lost Rolex watch and a diamond ring under his State Farm policy. Downie gave recorded statements to two different claims representatives. Allegedly, he was further asked but refused to sign a general authorization allowing State Farm access to his confidential records, and he refused to submit to an EUO.

State Farm informed Downie that it would not accept nor deny his claim until he completed the required investigation. Downie, thereupon, filed suit against the insurer alleging breach of contract, bad faith and a violation of the Consumer Protection Act. State Farm moved for summary judgment, arguing that Downie failed to comply with the policy that stated in part:

**Suit Against Us.** No action will be brought against us unless: a. there has been compliance with the policy provisions;

Downie argued that, notwithstanding the policy provision barring suit, factual issues exist as to whether State Farm was reasonable in demanding an EUO, and regarding whether he had *substantially complied* with the EUO requirement by giving multiple recorded statements to the adjustors. He further argued that an EUO would have been a useless act because it would not reveal any new information.

The trial court, in an apparent effort to appease both parties, ordered Downie to provide an affidavit stating that his earlier recorded statements were under oath and that they could be used for any purpose in the trial proceedings. Downie complied with the court by filing the required affidavit, but he would not admit to the authenticity of the recorded statement transcripts. The trial court, thereupon, granted State Farm’s motion for summary judgment and Downie appealed.

**A Recorded Statement is “Fundamentally Different” than an EUO**

The Washington Appellate Court acknowledged that no prior cases in that state had directly addressed the issue of whether an insured’s recorded statement substantially complies with the insurer’s demand for an EUO. Nevertheless, the court ruled in favor of State Farm by determining that a recorded statement is “fundamentally different” than an EUO because (1) a recorded statement is unsworn when it is made, (2) insurers in practice do not intend that recorded statements substitute for EUOs, and (3) the policy language allows insurers to conduct multiple interviews.

Therefore, according to the court, no substantial compliance could occur where *total* compliance with the EUO provision is lacking, i.e., where the insured does not submit to at least one EUO. The appellate court also took an interesting view of the term “reasonableness” by stating that an EUO is a
condition that must be satisfied prior to suit by an insured regardless of reasonableness, and that the insurer must only be reasonable in the number of EUOs it seeks.

Similarly, courts have held that an insured’s deposition, which was provided after a lawsuit has been filed against the insurer, does not excuse an insured’s failure to submit to an EUO before bringing suit. *Nationwide Insurance Co. v. Nilsen*, 745 So.2d 264 (1998).

**A Formal “Demand” is Required**

An insurer’s “demand” for an EUO is generally a condition precedent to the insured’s obligation to comply. The letter demanding the insured’s exam must designate the time and location of the EUO, as well as the identity of the individual conducting the exam (See Exhibit “A”). In addition, an EUO should be held within a reasonable distance from the insured’s home. *Weber v. General Accident Fire & Life Assurance Corp.*, 10 Ohio App. 3d 305, 462 N.E.2d 422 (1983) and *Huggins v. Hartford Ins. Co.*, 650 F. Supp. 38 (E.D.N.C. 1986).

The *Weber* court also held that notice must be sent not just to the insured’s attorney, but also to the insured. Failure to comply with these notice provisions may result in the insurer’s waiver of its defense that the insured failed to submit to an EUO. *Weber at 424*.

**Who the Insurer May Demand for an Exam**

In *State Farm Fire & Casualty Ins. Co. v. Miceli*, 164 Ill. App. 3d 874, 518 N.E.2d 357, 363, 115 Ill. Dec. 832 (1987), the Illinois Appellate Court (First District) held that a duty to demand an EUO applied only to named insureds and not their children, even though coverage extended to them. In apparent response to the court’s holding in *Miceli*, many insurers revised and broadened their policy language with respect to their right to demand an EUO. The revised policy language now often provides:

**YOUR DUTIES AFTER LOSS.** After a loss to which this insurance may apply you shall see that the following duties are performed:

[A]s often as we reasonably require, submit to and subscribe, while not in the presence of any other insured . . . , examinations under oath; and produce employees, members of the insured’s household or others for examination under oath to the extent it is within the insured’s power to do so . . . (emphasis provided).

In accordance with the above stated policy provision, an insurer may demand the EUO of any member of the insured’s household, and may close the exam to anyone other than the person being examined and their legal counsel. It should also be noted that where the insured is a corporation, its officers and/or directors may be subject to an EUO. *Ausch v. St. Paul Fire & Marine Ins. Co.*, 125 A.2d 43, 511 N.Y.S.2d 919 (1987), appeal denied 516 N.E.2d 1223 (1987). In addition, if the insured employs a public adjuster (PA) to assist with the presentment of his/her claim, the PA, as the insured’s “employee,” may be subject to an EUO as well.

**Allowable Scope of Questioning**

During an EUO, all questions considered material and relevant to the claim must be answered by the insured. The refusal of an insured to answer such questions, whether under advice of an attorney or not, may result in a denial of the claim. Furthermore, courts continually reiterate the settled principle that making a false and material statement, or failing to give complete responses during an EUO may be sufficient to void coverage. *Wagnon v. State Farm Fire and Cas. Co.*, Nos. 96-5012, 96-5013, 96-

While courts have given broad scope to what an EUO may encompass, (see Passero v. Allstate Ins. Co., 196 Ill. App. 3d 602, 606, 554 N.E.2d 384, 387, 143 Ill. Dec. 449, 452 (1990)), the scope has been limited to whatever is material and relevant. Thus, the EUO may encompass any subject considered material for the purpose of determining the insurer’s liability to a claim, and may include anything that reasonably allows the insurer to protect itself from false claims. See Passero at 388.

For example, in a case of suspected arson, the insurer generally may question the insured on matters relating to the insured’s financial condition in an effort to establish whether a motive for arson existed. Accordingly, in Gipps Brewing Corp. v. Central Mfrs. ’ Mut. Ins. Co., 147 F.2d 6 (1945), the court allowed for a “searching exam” of the insured where the insurer had a reasonable basis for suspecting fraud by the insured.

Production of Records

Generally the insurer, in addition to a demand for an EUO, will demand that the insured produce certain documents to assist in substantiating their claim. Refusal to comply with the demand to produce the requested documents, if deemed to be material and relevant to the insurer’s investigation, will likely result in a basis for denial of the claim.

Courts have frequently allowed the insurer to demand from the insured, as part of its claims investigation, documents such as income tax returns and bank statements. See U.S. Fidelity & Guaranty Co. v. Conaway, 674 F. Supp. 1270 (N.D.Miss. 1987); Stover v. Aetna Cas. And Sur. Co., 658 F. Supp. 156 (S.D.W.Va. 1987); and Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141 (D.C. Wis.1968), aff’d 416 F.2d 967 (7th Cir. 1969). However, in Chavis v. State Farm Fire and Cas. Co., 317 N.C. 683, 346 S.E.2d 496 (1986), the court qualified the above-stated general rule and held that an insurers’ request for financial documents must be both reasonable and specific.

Insured’s Refusal to Answer Questions During an EUO

At least two state courts have issued contrasting opinions regarding the right of insureds to refuse to answer questions during an EUO. For example, in Crowell v. State Farm Fire and Cas. Co., 259 Ill. App. 3d 456, 631 N.E.2d 418, 197 Ill. Dec. 415 (5th Dist. 1994), the Illinois Appellate Court granted an insured the right to withhold compliance of his duty to submit to an EUO until after suit was filed. The court reasoned that the insured, who was suspected of arson, should be allowed to cure the apparent breach of the policy’s conditions by answering those questions during a deposition that he earlier refused to answer during an EUO. Although the insurer provided the insured with many opportunities to obtain legal counsel for the EUO, the court concluded that the insured’s refusals were allowable because legal counsel did not represent him during the exam. It is interesting to note that a dissenting opinion in Crowell warned that the effect of the court’s ruling would result in an increase of non-cooperation by insureds who may be operating under the advice of an absentee attorney.

It should also be noted that the insurer’s attorneys in Crowell filed a Motion for Summary Judgment. However, the case is silent regarding whether the insurer sought an earlier Motion to Dismiss based upon the provision in most policies that bars suit by an insured until after they have fully complied with all of the terms of the policy. Thus, failure by the insured to comply with the insurer’s demand for an EUO arguably impedes a suit against the insurer for its denial of coverage. The applicable policy provision provides:

Suit Against Us. No action shall be brought against us unless there has been compliance with the policy provisions.
Converse to Crowell, in Powell v. United States Fidelity and Guar. Co., 88 F. 3d 271 (1996), a Virginia court affirmed an insured’s duty to submit to an EUO, and duty to supply financial information to an insurer as a condition precedent to coverage. In that case, the insureds refused to submit to an EUO, refused to produce financial records, and filed a state court action to compel the insurer to provide coverage. The court stayed the suit and ordered the insureds to submit to an EUO. However, during the exam the insureds allegedly refused to answer numerous questions, including whether they had mortgages on other real estate, the types of automobiles owned and related debt, whether the couple was subject to any judgments, and regarding information on recent income from a business.

In finding for the insurer, the Powell court opined that one of the purposes of requiring EUOs and the production of documents is to protect the insurance company against false claims, and that it is clear that questions about the insureds’ financial situation are relevant to the insurance company’s investigation of a fire.

Impact of the Insured’s Failure to Comply


Moreover, in most cases the insurer need not show prejudice from the insured’s refusal to comply, so long as, the refusal resulted in an unreasonable delay. U.S. Fidelity & Guar. Co. v. Wigginton., 964 F.2d 487 (5th Cir. 1992); but see Aetna Cas and Sur. Co. v. Murphy, 206 Conn. 409 (1988) (finding it is the insured who must establish that his delay did not cause prejudice to the insurer). Even a belated offer by the insured to comply with a demand for an EUO may not excuse its breach if, as a result of the delay, information is difficult to recall or evidence is destroyed. Watson v. National Sur. Corp. of Chicago, IL, 468 N.W.2d 448 (Iowa 1991); Archie v. State Farm Fire and Cas. Co., 813 F. Supp. 1208 (S.D.Miss. 1992).

Further, if an insured makes its first offer to comply with an insurer’s demand for an EUO while the case is on appeal, such an offer may be viewed as insufficient to constitute reasonable compliance and will not likely excuse the earlier breach. Pervis v. State Farm Fire and Cas. Co., 901 F.2d 944 (11th Cir. 1990), cert. den. 498 U.S. 899 (1990). The court in Pervis also held that the insurer was under no obligation to repeat its formal demand for an EUO once the insured had refused compliance. Id. at 948.

Substantial Compliance

Unlike depositions, the insurer may be allowed several “bites at the apple,” i.e., opportunities to conduct multiple EUOs when necessary. Thus, the policy language in many property policies provide that an insurer may exam its insured “as often as we reasonably require.” Therefore, if prior to reaching a coverage decision, and subsequent to an initial EUO, the insurer uncovers additional facts that reasonably require further questioning of the insured, another demand for the insured’s exam may be considered appropriate if the contract provides accordingly. As an aside, it should be noted that if suit is later filed respecting the presented claim, the insurer will, in accordance with the state’s code of civil procedure, generally be allowed to also depose the insured.

Note, however, that the court in Watson, 468 N.W.2d 448 (1991), held that the insured does not breach the policy where the insured has substantially complied with the insurer’s demand for an EUO. While the insurer might have to justify the reasonableness of its policy’s requirements, generally it is the insured that must carry the burden of showing that his or her compliance with these requests was

**Insured’s Right to Legal Counsel**

Typically, an attorney is retained to represent the insurer and will make the demand and conduct the EUO. In many cases, the insured will likewise retain legal counsel who will request to be present during the proceeding.

Courts have held that while an insured has a right to have her own attorney present at an EUO, the insured’s attorney cannot participate in the process. See Hart v. Mechanics & Traders Ins. Co., 46 F. Supp. 166 (1942); Shelter Ins. Cos. v. Spence, 656 S.W.2d 36 (Tenn. App. 1983). Thus, an insured is often unable to hide behind the objections of counsel. Furthermore, procedural and evidentiary constraints of formal legal proceedings do not generally apply to EUOs. It is important to mention that denial of an insured’s right to legal representation may bar the insurer from denying a claim on the basis of the insured’s failure to comply with its demand for an EUO.

**Insured’s Right to Seek Protection Under the 5th Amendment**

 Courts have held that while the insured has the right to assert protection under the 5th Amendment, such right has no application to a private examination arising out of a contractual relationship. In short, the 5th Amendment protections against self-incrimination are not an excuse for failure to comply with an EUO. See Galante v. Steel City Nat. Bank, 66 Ill. App. 3d 476, 384 N.E.2d 57, 23 Ill. Dec. 421 (1987), Abraham v. Farmers Home Mutual Ins. Co., 439 N.W.2d 48 (Minn. 1989), and Hickman v. London Assurance Corp., 184 Cal. 524, 18 A.L.R. 742, 195 P. 45 (1920). The court in Kisting, 290 F. Supp. 141, 149 (1968), reasoned that an insured should not be allowed to use the 5th Amendment as both a “shield and a sword.”

Similarly, in Baldwin v. Bankers & Shippers Ins. Co., 222 F.2d 953 (9th Cir. 1955), the court held that, so long as the request was material to the examination, an insured must reveal its tax records even if it might subject the insured to possible criminal prosecution. Furthermore, in Pervis, 901 F.2d 944 at 946-7, footnote 4 (11th Cir. 1990), the court stated that whether or not the insurer knew of and cooperated with the prosecution of the insured, the insurer was still entitled under the contract to seek a sworn statement from the insured.

**Waiver of Rights**

An insurer’s right to examine its insured is a privilege which may inadvertently be waived by the insurer. For example, a waiver of the right to examine the insured may occur by the insurer accepting or denying liability for a claim prior to demanding an EUO. Thus, rights under the policy may be lost by waiver or estoppel where the conduct of an insurer induces the insured to believe that he need not comply with certain policy provisions or that such provisions will not be enforced. Downing v. Wolverine Insurance Co., 62 Ill. App. 2d 305, 210 N.E.2d 603, 606 (2d Dist. 1965). In fact, the court in Gipps Brewing, 147 F.2d 6 (1945), held that policy provisions which state that no waiver can occur without the waiver being in writing, may still be waived by the mere conduct of the insurer.

**Conclusion**

An examination under oath, effectively conducted, is a useful and expedient method for assisting the insurer in reaching a wise and fair coverage decision respecting a claim, and it also provides an opportunity for the insured to explain, at length, the circumstances of the loss, and an opportunity to substantiate the value and interest in the property claimed.
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