

Understanding and Documenting Lost Income Claims *(cont'd.)*

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Continuing payroll is part of the loss of income calculation, not a separate compensable amount.

Understand the difference between cash flow and operating expenses. For example, payment of loan principal is not a compensable expense. The interest portion of the payment usually is. Loan amortization schedules should be obtained. Additional borrowing and the related expenses are not compensable, as this is considered a lack of adequate capital for the business.

Depreciation is a common area of misunderstanding. Fixed asset depreciation schedules are needed to calculate the saved depreciation expense for the

loss calculation. If an asset is destroyed that was currently being depreciated, that expense cannot continue and it stops. Insurance may cover the fair market value of the damaged asset. To continue its depreciation expense in the loss calculation will result in an overpayment of the loss.

CONCLUDING COMMENTS

Calculating lost income claims with a reasonable degree of accounting certainty is a complex area. While not rocket science, it includes the application of many concepts and specifics that the ordinary business person, accountant or CPA has not dealt with previously and is thus prone to errors. Even if proper calculation methods are

use, the expert's findings are still dependent on the use of reasonable assumptions and estimates. To obtain a fair result, assumptions must be deemed likely, not merely possible and loss calculations based on accepted principles.

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Words Matter When Requesting an Examination Under Oath, *by Andrew*

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An unfortunate fire loss destroys the building where a small, bustling company and your insured, Dunder Mifflin Paper Company, is headquartered. A number of suspicious circumstances surround the loss. Employee and town volunteer sheriff deputy, Dwight Schrute, claims another employee, Jim Halpert, set the fire. Counsel requests the Examination Under Oath (“EUO”)

of Dunder Mifflin’s “corporate representative.” Dunder Mifflin designates its regional manager, Michael Scott, as the corporate representative. Your counsel then requests additional EUOs from Jim Halpert, Dwight Schrute, and the company’s CEO, David Wallace. Counsel for Dunder Mifflin is hired, and objects, claiming the company will only submit Michael Scott for the one

and only EUO permitted under the terms and conditions of insurance policy. What do you do? This is a common situation in nearly every insurance claim involved a corporate entity as the named insured, and the answer is not always so clear.

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Words Matter *When Requesting an Examination Under Oath* (cont'd.)

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What Does the Policy Say?

The insurance policy contract gives the insurer the right to compel an EUO pursuant to the terms and conditions of the policy. If the policy does not permit the testimony the insurer wishes to obtain, requesting a Sworn Statement is always an option. Nevertheless, while a Sworn Statement is a helpful, information gathering tool, it is not nearly as powerful of a tool as an EUO. First, a Sworn Statement is completely voluntary in nature – an insurance policy contract cannot mandate a third-party witness to provide a Sworn Statement. Second, the witness' statements obtained through a Sworn Statement cannot be used directly against that witness when considering potential policy exclusions for actions such as fraudulent misrepresentation or concealment.

You must read the exact language of the EUO provision contained in the insurance policy at issue between the insured and insurer. Not every EUO clause is created equally. This is especially true when the named insured is a corporate entity, such as a corporation or limited liability company. Consider the following provisions contained in the standard "duties in the event of loss" clause of any insurance policy:

- "We are permitted to examine the named insured under oath."
- "Permit us to examine any insured under oath, outside the presence of any other insured at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed."
- "The insured, as often as may be reasonably required, shall submit to examinations under oath by any

person named by this Company, and subscribe the same."

- "You are required to submit to one or more Examinations Under Oath, outside the presence of any other insured." The policy further defines "you" and "insured" to include "any and all employees, agents, directors, and officers of the Company."

Review of the Case Law

The following case decided in U.S. District Court for the Southern District of Florida is instructive. In *Vision I Homeowners Assn., Inc. v. Aspen Specialty Ins. Co.*, 674 F.Supp.2d 1333 (S.D.Fla. 2009), the defendant insurer argued it was entitled to summary judgment on the claim of breach of contract because the plaintiff insured failed to comply with its request to provide additional EUOs. The insured submitted a corporate representative for EUO and provided the insurer with numerous documents before the EUO, but the insured would not submit additional individuals for EUO, nor did the insured's witness sign and signature and errata pages to his transcript of testimony. The policy stated, in pertinent part:

We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records.

The court noted that there was no provision in the policy that required that the insured subject itself to more than one EUO, despite the fact that the policy stated that the insurer was entitled to examine "any insured." Further, "there is no provision as to when [the witness] was required to sign the EUO answers. *Id.* at 1341. Therefore, the court held it could not find "that Plaintiff has failed

to comply with the EUO requirements under the policy, failed to produce requested information, or failed to cooperate in the investigation." *Id.* See also *El Dorado Towers Condo. Assn. v. QBE Ins. Corp.*, 717 F.Supp.2d 1311, 1319-1320 (S.D.Fla. 2010).

In addition to the issue regarding who exactly can be examined, be careful when assuming the insurer has the right to conduct multiple EUOs outside the presence of each witness. Not every policy contains the specific language noted above when dealing with this issue – "You are required to submit to one or more Examinations Under Oath, outside the presence of any other insured." Courts have been hesitant to imply a right to separation of witnesses where this policy language is absent.

For instance, in *United States Fidelity & Guaranty Co. v. Hill*, 722 S.W.2d 609 (Mo. Ct. App. 1986), the Western District Court of Appeals in Missouri held the right to take EUOs separate and apart from the other insured is not a given right to the insurer, absent a policy provision on point. The court, in reviewing the policy, stated:

There is certainly nothing in the power to request an insured to submit to more than one examination under oath from which it could be implied that the company had discretion to demand that the examination be separate and apart. The only way this court could reach the result requested by USF&G would be to rewrite the policy and to add provisions which are not now there nor which are contended to be contained by a reasonable construction of the language employed. USF&G would have this court undertake a complete rewriting of the provisions providing for the examination

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Words Matter When Requesting an Examination Under Oath (cont'd.)

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under oath. That is beyond the power of the courts in this state.

Id. at 611. See, e.g., *Ahmadi v. Allstate Ins. Co.*, 22 P.3d 576, 580 (Colo. Ct. App. 2001) (“Because the policy here contains a requirement for an examination under oath, but does not impose an additional requirement that the examination be held separately and without any other claimants being present, we conclude that the trial court erred in holding that the claimants had breached the cooperation clause.”); *Georgian House of Interiors v. Glens Falls Ins. Co.*, 21 Wn.2d 470, 151 P.2d 598 (Wash. 1944).

What Are My Options Where the Policy Language is Lacking?

Insurance policies typically contain a general clause imposing a “duty to cooperate” with the insurer’s investigation. This clause is usually found in the same list of provisions as the EUO clause in the duties in the event of loss or damage section of a policy. The duty to cooperate clause, along with the clause pertaining to “concealment of material facts,” can be of assistance

when the insured company refuses to submit to more than one EUO.

Indeed, a court could very well determine the failure to submit more than one corporate representative would hinder the insurer’s investigation. A showing that the witness’ anticipated testimony is relevant to the issues and facts implicated by the loss. If this is demonstrated by the insurer, failure to submit additional corporate agents for EUO could be seen as a violation of the duty to cooperate and concealment of material fact provisions of a typical insurance policy.

However, not every court may view the duty of cooperation clause so broadly. Indeed, in *Ahmadi v. Allstate Ins. Co.*, 22 P.3d 576, 579 (Colo. Ct. App. 2001), the Colorado Court of Appeals rejected the insurer’s contention the insured’s refusal to consent to the request for sequestration of multiple EUO witnesses constituted a violation of the duty to cooperate clause of the insurance policy.

Conclusion

Words matter. Always review the exact terms and scope of your insurance

policy’s EUO clause. Never assume the policy require certain actions on the part of the insured or contains certain provisions – not every policy is identical. This issue can further be complicated in the corporate context where questioning potentially multiple witnesses may be necessary to thoroughly investigate an insurance claim.

If you cannot rely upon the exact language of the EUO clause to your benefit, always consider the duty to cooperate provision, and potentially other duties and obligations imposed by the policy.

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