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DTCI: The Examination Under Oath

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In 1884, the United States Supreme Court recognized the importance of allowing insurers to "examine" an insured regarding an insurance claim. The court recognized:

The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, 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 Ins. Co., 110 U.S. 81 (1884).

The concepts written by Justice Stanley Matthews in 1884 ring as true today. Subject to specific policy provisions, the right of an insurer to question its insured regarding a given claim is widely recognized.

In the realm of insurance claims, it is safe to say that in only a small percentage of claims does the insurer request an examination under oath by the insured. The examination under oath ("EUO"), however, can be an invaluable tool for an insurer when, for one reason or another, it requires more pertinent information *before* making a final determination regarding coverage under the policy.

Protection against false claims is one important situation in which an EUO might be requested. But even then, the purpose of the EUO remains to gather all relevant information from the insured so that the insurance company may make a fully informed decision regarding which coverages may be afforded under the policy at issue.

I. The 'Nuts and Bolts' of the Examination Under Oath Policy Provision

Whether automobile, homeowner, renter or commercial, almost every insurance policy contains provisions allowing the insurer to request sworn testimony from its insured. This sworn testimony is generally referred to as an "examination under oath." There are several characteristics that are common to most EUO policy provisions.

A. The location of the provision in the policy

Most commonly, policy provisions requiring an insured provide examination under oath testimony are located in the conditions section of the policy. Many people mistakenly refer to *the cooperation clause* when addressing or responding to a request for an EUO. It is important to distinguish a general requirement an insured may have to cooperate with her insurance carrier from a separate affirmative obligation an insured may have when making a claim under the express terms of her policy. The EUO is usually considered an express condition precedent to coverage under the policy.

In 2006, the Indiana Supreme Court addressed this distinction in *Morris v. Economy Fire & Casualty Co.:*

Property coverage provisions of homeowners insurance policy stating insured's duties after loss were not co-operation clauses; they required the insured to show the damaged property, provide records and documents requested by insurer, and submit to examination under oath.

Morris v. Economy Fire & Cas. Co., 848 N.E.2d 663 (Ind. 2006).

This distinction is significant as disputes regarding an alleged breach of a cooperation clause may well require a showing of prejudice, while the failure to perform a condition precedent may, in general contract terms, negate the enforceability of the contract.

B. 'As often as we reasonably require …'

Most insurance policies contain a provision permitting EUO testimony as often as reasonably necessary. The EUO is one tool an insurance company has under the policy to allow a thorough investigation of coverage to occur. No matter how extensive an investigation has been completed before an EUO, under no circumstances should the insurance carrier enter an EUO with any predisposition on which coverage, if any, might be afforded under the specific policy.

Often, attorneys representing claimants will suggest the EUO requirement has been effectively accomplished based on prior recorded statements given in connection with the subject loss. Even a claimant's willingness to stipulate, under oath, to the transcript of a prior statement does not satisfy the examination under oath requirements under Indiana law. *Knowledge A-Z, Inc. v. Sentry Insurance*, 857 N.E.2d 411 (Ind. Ct. App. 2007). Where a claimant refuses to cooperate with an examination under oath request but then files suit and testifies by way of deposition, courts elsewhere have ruled that even this fails to satisfy the EUO requirement. *Spears v. Tennessee Farmers Mutual Insurance Co.*, 300 S.W. 3d 671 (Tenn. Ct. App. 2009). Under this provision, even after an EUO has been taken, additional testimony can be requested if reasonably necessary. Under *Morris*, compliance with a request for an EUO is neither optional nor subject to a predetermination of reasonableness.

C. 'Separate and apart'

Most examination under oath policy provisions require that the testimony of multiple insureds be given separately and apart from one another. So long as the provision is written clearly and unambiguously, it is enforceable under Indiana law. *See Morris*, 848 N.E.2d 663. Under *Morris*, an insured may not establish any noncontractual preconditions on the express terms and conditions of the insurance policy's examination under oath provision. As with any aspect of an insurance claim, each request for EUO testimony shall be evaluated on its own merits; this provision should be waived only in unique circumstances.

The separation of insureds from one another is a point on which opposing attorneys will sometimes argue that an insurance company is acting unreasonably. In such circumstances, it is important to respond to such arguments with specific reference to the express terms and conditions of the insurance policy, and if appropriate, reference to specific case authority. Just as we recognize the importance of witness separation in the context of a jury trial, the same rationale applies to these policy provisions.

II. An Adversarial Proceeding?

The examination under oath, in and of itself, is often misconstrued as an adversarial proceeding. A lawsuit is clearly an adversarial proceeding. In the context of a lawsuit, opposing parties compete, seeking a result most favorable to themselves, usually to the detriment of the opposing party. The EUO should not be viewed as an adversarial proceeding.

The purpose of any insurance claim investigation must be to determine which coverages, if any, might be afforded for a particular loss under the insurance policy. The EUO is but one fact-finding tool the insurance company has at its disposal to ensure it can fully evaluate coverage issues. For any attorney retained by an insurance company to examine its insured under oath, it is important that counsel give at least as much consideration to the insured's interests as it gives to the interest of the insurance carrier. Counsel must approach every examination under oath objectively.

Although not adversarial in nature, conducting an examination under oath often requires asking difficult or pointed questions. In advising insurance clients, counsel should explain that the EUO has a dual purpose. On one hand, the examination under oath is an opportunity for the insurance company to ask questions and gather information from its insured; on the other hand, it is equally an opportunity for the insured to fully and completely explain all aspects of the claim before a final decision is made. Based on this dual purpose, it is not only reasonable for counsel to ask the difficult or pointed questions, it is essential in order to identify all issues and to ensure that the claimant has had every opportunity to respond to such issues.

III. Who, What and Why?

The scope and parameters of EUO requests will always depend upon the unique facts and circumstances of a given claim, as well as the specific wording of the insurance policy.

A. Who must provide an Examination Under Oath?

Determining who must provide an EUO depends entirely upon the specific terms and conditions of the insurance policy under which the claim is made. Depending upon the type of insurance policy with which you are dealing, the identity of "who" must provide testimony can differ greatly. "Who" must provide EUO testimony can be any of these persons:

- "You"
- "Insured"
- "Insured person"
- "Members of household"
- "Others within your control"
- "Employee" or "representative"
- "Any person making a claim"

These are just a few examples of how policies may differ in the scope of who must provide testimony. Once counsel understands who may be compelled to provide testimony under the terms and conditions of the policy, it becomes their job to advise their clients which individuals *should be* requested to testify.

B. What is being requested?

Oftentimes, a request for EUO testimony may be made contemporaneously with demands for other cooperation under the insurance policy. For example, if a sworn statement in proof of loss has been requested, a determination must be made whether to postpone EUO testimony until after the submission of the sworn statement in proof of loss. In addition, most policies will include a duty to produce relevant information and documents during a claim investigation, and a determination must also be made regarding which documents, if any, are essential to request and obtain before taking testimony.

C. Why is an Examination Under Oath necessary?

Once again, the EUO is a tool the insurance company has at its disposal when it has determined that additional information is needed before making a final coverage decision. There is a popular

misconception that any time an EUO is requested relative to an insurance claim, the insurance company suspects fraud. While this may be one reason examinations under oath are requested, it is by no means the only reason. Testimony regarding occupancy of property, use of property or even conversations between the insured and company representatives may warrant an EUO.

IV. What the Examination Under Oath Is Not

The EUO is not a deposition. This may seem a very simplistic statement, but the perils of confusing the two can be great, and the terms should not be used interchangeably.

The examination under oath arises solely and completely out of the contract of insurance that the insured purchases. A deposition arises in the context of a lawsuit. In requesting an EUO, the insurance company does not have the rules of procedure at its disposal, as would parties to a lawsuit. This includes the subpoena power. Unlike a deposition, the EUO is subject neither to the rules of evidence nor to the rules of trial procedure. The terms and conditions of the insurance policy alone govern the scope and parameters of the examination under oath.

These differences are significant for several reasons. First, taking an EUO in the context of an insurance claim investigation does not preclude taking the same person's depositions in the event a subsequent lawsuit is filed stemming from the same occurrence. Similarly, common evidentiary objections routinely raised in the course of a deposition serve no purpose during an EUO. As the purpose of the EUO is to gather all available facts and information so a fully informed coverage decision can be made, evidentiary objections (such as hearsay) have no legal significance. In fact, in the context of the EUO, the insured *must* be given every opportunity to provide any and all information or evidence (whether first-hand or not) that in any way relates to the pending claim.

V. Conclusion

This article is but the tip of the iceberg with respect to the examination under oath. Many attorneys, even seasoned litigators, may go years without encountering an EUO. It is also true not every insurance attorney routinely deals with examinations under oath. For these reasons, it is important to understand what the examination under oath is when it is encountered.

The EUO should not be viewed as an adversarial proceeding but rather as an opportunity for the insurance company to ask questions of its insured regarding all aspects of the insurance claim. It is also as an opportunity for the insured to provide her insurance company with all information that she believes is relevant and pertinent. This is the "Golden Rule."

At the beginning of every EUO, regardless of the issues, counsel should make a single promise to every insured:

I promise you, Mr./Ms. Insured, before completing your examination under oath, we will not go off the record until you are 100% satisfied you have been given a full and fair opportunity as the insured under the policy, to provide all knowledge, information or evidence of any type or nature you believe your insurance company should consider before making a final decision on your claim.

This promise helps solidify the purpose of the EUO, as expressed by Justice Matthews more than 120 years ago.•

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