

An Examination Under Oath

Not Just Another Deposition

By Rick Hammond

Experienced lawyers who approach their first examination under oath (EUO) as they would a discovery deposition typically find themselves in for a shock. The attorney representing the insured may find himself less than prepared to present his client for questioning. 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 EUO of its insured and a right to demand records and documents in support of the presented claim. The standard policy provision respecting these rights 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 U.S. Supreme Court first articulated the purpose of an EUO:

The object of the provision 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.¹

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

Recorded Statements versus EUOs

In *Downie v. State Farm*,² 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 an 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.

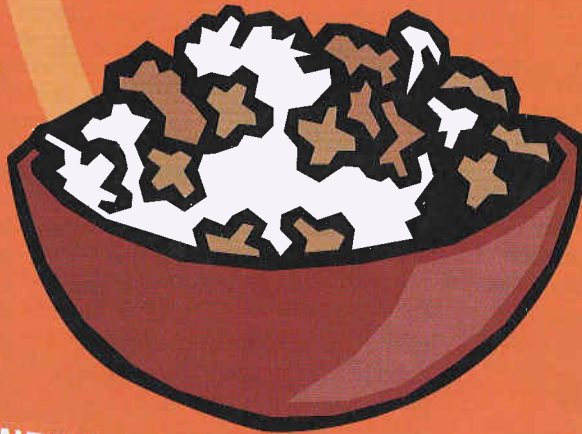
State Farm informed Downie that it would not accept nor deny his claim until he completed the required investigation. Downie thereupon filed suit against the insurer alleging breach of contract, bad

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Attorney-Tested, Court-Approved!



NET WEIGHT 24 OZ RELEVANCE

EUO Facts

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Consume only after reviewing case law and statutes of jurisdiction of inquiry.

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faith, and a violation of the state's Consumer Protection Act. State Farm moved for summary judgment, arguing that Downie failed to comply with the policy, which stated in part that "[n]o action shall be brought against us unless there has been compliance with the policy provisions." Downie argued that, notwithstanding the policy provision barring suit, factual issues existed as to whether State Farm was reasonable in demanding an EUO and whether he had substantially complied with the EUO requirement by giving multiple recorded statements to the adjusters. He further argued that an EUO would have been useless 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.

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 complied 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.³ The *Downie* decision represents the common view held by courts that the EUO requirement is reasonable and a valid condition precedent to the right to receive benefits.

According to the court, then, 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.⁴ The appellate court also took an interesting view of the term "reasonableness" by stating that an EUO is a condition that must be satisfied before suit by an insured regardless of reasonableness, and that the insurer must only be reasonable in the number of EUOs it seeks.⁵

Similarly, courts have held that an insured's deposition that was provided *after* a lawsuit has been filed against the insurer does not excuse that insured's failure to submit to an EUO before bringing suit.⁶

The Need for a Demand

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 person conducting the exam. (See the sample demand letter on page 55.) In addition, an EUO should be held at a reasonable distance from the insured's home, as noted in *Weber v.*

General Accident Fire and Life Assurance Corp. and other cases.⁷

The *Weber* court also held that notice must be sent not just to the insured's attorney but also to the insured.⁸ 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.⁹

In *State Farm Fire & Casualty Insurance Co. v. Miceli*,¹⁰ the Illinois Appellate Court held that a duty to demand an EUO applied only to named insureds and not their children, even though coverage extended to them.¹¹ 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 added.)

Per this 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 his or her 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.¹² In addition, if the insured employs a public adjuster to assist with the presentment of his or her claim, the public adjuster, as the insured's "employee," may be subject to the EUO as well.

Rick Hammond is a shareholder in the Chicago law firm of Johnson & Bell, Ltd., where he concentrates on first-party insurance coverage, bad faith litigation, and insurance fraud. He previously served as head of the Illinois Department of Insurance's Chicago office and as executive director of the Insurance Committee for Arson Control (ICAC). Hammond now serves as general counsel for ICAC and as counsel for the International Association of Arson Investigators' Foundation. He can be reached at hammond@jbltd.com.

